(23,085 and 23,194)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 573.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

BOISE CITY.

FILED MARCH 13, 1912.

No. 639.

BOISE CITY, PLAINTIFF IN ERROR,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED.

FILED APRIL 29, 1912.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR DISTRICT OF IDAHO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1912.

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The Supreme Court of the United States.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
BOISE CITY, a Municipal Corporation, Defendant in Error.

Transcript of Record.

Mr. Richard H. Johnson and Messrs. Johnson & Johnson, residence, Boise, Idaho, Attorneys for Plaintiff in Error.
Messrs. Cavanah, Blake & McLane, Residence, Boise, Idaho, Attorneys for Defendant in Error.

Complaint.

In the Circuit Court of the United States for the District of Idaho, Central Division.

At Law. No. 313.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Complaint.

The Boise Artesian Hot and Cold Water Company, Limited, a corporation organized and existing under the laws of the State of West Virginia and a citizen of said State, plaintiff in this action, complains of Boise City, a Municipal Corporation organized and existing under the laws of the State of Idaho, and a citizen of said State, and an inhabitant of the Central Division of the District of Idaho, aforesaid, and says:—

I.

That plaintiff is now, and at the times hereinafter mentioned was, a corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business at Boise City, Ada County, State of Idaho; and that within three months from the time it commenced to do business in the State of Idaho, to-wit, on the fourth day of September, 1901, it designated B. S. Howe, a person residing in Ada County, Idaho, the County in which its principal place of business in Idaho is conducted, upon whom process issued by authority of, or under any law of said State, might be served, and on said last-named date filed such designation in the office of the Secretary of State of the said State of Idaho and in the office of the Clerk of the District Court of said

County of Ada; and that within three months after the taking effect of the act of the legislature of Idaho approved March 10, 1903, relating to foreign corporations, it filed with the county recorder of said County of Ada a copy of its articles of incorporation, duly certified to by the Secretary of State of West Virginia, and also filed a copy thereof, duly certified by said County Recorder with the Secretary of State of Idaho, and all of said designations have ever since remained and now are in full force and said copies have ever since remained and are now on file in said offices.

II.

That said defendant Boise City, is now and at the several times hereinafter mentioned was, a municipal corporation within the County of Ada, State of Idaho, organized and existing under and by virtue of the laws of the said State of Idaho.

III.

That this plaintiff is authorized and empowered by its articles of incorporation to furnish water to said defendant and its inhabitants for all useful and beneficial purposes and to take, purchase, acquire, hold, operate and maintain the rights, properties, franchises and privileges of other water companies, associations or corporations and to be the successors in interest thereof.

IV.

That on October 3, 1889, the Mayor and Common Council of said defendant, under authority contained in its charter, by an ordinance duly passed and approved on said day, granted to H. B. East-
3 man and B. M. Eastman, and their successors in interest, the authority to lay and repair their water pipes in, through and along and across the streets and alleys of Boise City for the purpose of supplying water to the residents of said city, and on July 10, 1890, the Mayor and Common Council of said defendant, acting under powers contained in its charter and in the general laws of said State of Idaho, relating to water and canal corporations, duly passed and approved on said day an ordinance authorizing the Artesian Water and Land Improvement Company, its successors or assigns, to lay down and maintain water pipes in the streets and alleys then laid out or thereafter to be laid out and dedicated in said Boise City.

V.

That after the said ordinances were passed by said Common Council and approved by said Mayor of Boise City, the grantees of the said privileges, to-wit, the said H. B. and B. M. Eastman and the said Artesian Water and Land Improvement Company, proceeded to supply said defendant with water under authority of such ordinances, and thereafter and on the 28th day of August, 1901, this plaintiff, through divers intermediate conveyances became and ever since has been and now is the owner of said ordinances and of

all rights, privileges and franchises thereby granted and is the successor in interest in all respects of the said H. B. and B. M. Eastman and of said Artesian Water and Land Improvement Company, therein, and ever since said last-named date, this defendant has continued to supply and is now supplying water to said defendant, and its inhabitants under authority contained in said ordinances.

4 VI.

That on or about the 11th day of May, 1905, pursuant to section 2711 of the Revised Statutes of Idaho, and the Act approved March 9th, 1905, amendatory thereof, both being now embraced in section 2839 of the Idaho Revised Codes, two commissioners were appointed by the Mayor and Common Council of defendant, and two commissioners were within thirty days thereafter, duly appointed by this plaintiff for the purpose of determining the rates to be charged by plaintiff for water for domestic and other purposes and also for fire purposes in said Boise City.

VII.

That the said four commissioners duly met and within ninety days from the date when said board of water Commissioners was complete, they unanimously adopted a schedule of rates to be charged by this plaintiff for all purposes, as required by said statute, including rates to be paid by said defendant to this plaintiff for water for fire purposes. That the said schedule of rates adopted by said board of water commissioners went into effect on the first day of August, 1905, and ever since has been and now is in full force and effect.

VIII.

That the said Board of Water Commissioners fixed and established a rate to be paid by said defendant to this plaintiff in words and figures, as follows, to-wit:—

"Monthly Water Rates."

* * * * * * *

Fire Hydrants:

"$3000 per annum for the fire hydrants now in use, and $3.50 monthly for each additional hydrant hereafter established under conditions in supplementary report."

5 That a copy of said supplemental report containing the conditions referred to, is hereto annexed, made a part of this complaint and marked "Exhibit A."

That the number of fire hydrants in use by said city at the time of the adoption of said rates by said board was ninety, and this number continued to be so used by said city until sometime prior to November 1st, 1908, when eleven additional fire hydrants were installed, which, together with said original ninety, have ever since been used and are now in use by said city for taking water for fire purposes from the pipes of this plaintiff. That plaintiff has, at all

times since said rates were determined by said board, maintained the required pressure for fire purposes and complied with all of the conditions contained in said report, and has, during all of said times, supplied the defendant with water for fire purposes and defendant has used the said hydrants to take water from plaintiff's pipes and mains at a large number of fires, and said water and said hydrants were during all of said times and still are available for use by said defendant for fire purposes.

IX.

That from August 1, 1905, to May 1, 1906, or for a period of nine months, the said defendant regularly paid to this plaintiff the said rates for fire purposes, amounting in the aggregate to twenty-two hundred and fifty dollars and no more, but since May 1, 1906, said defendant has failed, neglected and refused to pay to plaintiff any further sum whatever for such fire purposes, although plaintiff has frequently demanded payment from defendant of the amount due therefor.

That there is now due, owing and payable, from said defendant to this plaintiff, the sum of nine thousand seven hundred and
6 fifty ($9,750) dollars, for fire purposes in accordance with said rates as established by said board of water commissioners, for ninety fire hydrants, for three years and three months, from May 1, 1906, to August 1, 1909, at the rate of three thousand dollars per annum, and the further sum of three hundred forty-six and 50/100 ($346.50) dollars for eleven additional hydrants at three and 50/100 ($3.50) dollars per month each, for nine months from November 1, 1908, to August 1, 1909, or the total sum of ten thousand and ninety-six and 50/100 ($10,096.50) dollars.

That the amount in controversy in this action exceeds, exclusive of interest and costs, the sum of two thousand dollars.

Wherefore plaintiff prays for judgment against said defendant for the said sum of ten thousand and ninety-six and 50/100 dollars, with interest on three thousand dollars thereof from May 1, 1907, and interest on the further sum of three thousand dollars thereof from May 1, 1908, and interest on the further sum of three thousand two hundred and thirty-one dollars thereof from May 1, 1909, and interest on $288.50 thereof, from June 1, 1909, and interest on $288.50 thereof from July 1, 1909, and interest on $288.50 thereof from August 1, 1909, until judgment, and for interest on said judgment and for its costs and disbursements incurred in this action.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LTD.,
By JOHNSON & JOHNSON,
Its Attorneys Herein.

Address: 112 North Sixth Street, Boise, Idaho, where papers herein are to be served on Plaintiff.

7 STATE OF IDAHO,
County of Ada, ss:

B. S. Howe, being first duly sworn, deposes and says, that he is an officer, to-wit, the Secretary of the plaintiff corporation and makes this verification for and on behalf of said plaintiff. That he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be upon his information or belief and as to those matters that he believes it to be true.

(Signed) B. S. HOWE.

Subscribed and sworn to before me this 30th day of August, 1909.

[SEAL.] RICHARD H. JOHNSON,
Notary Public.

8 "EXHIBIT A."

Supplemental Report of the Water Commission.

To the Hon. James A. Pinney and the members of the City Council of Boise City.

GENTLEMEN: In the report of this committee relative to the use of water for fire purposes the rate was fixed as follows:

Three Thousand ($3,000.00) dollars, per annum for fire hydrants now in use and $3.50 monthly for each additional hydrant hereafter established under the conditions set forth in the supplementary report. In fixing the rate for this purpose it is essential to know what service is to be rendered by the Water Company and the commission has therefore specified the following conditions:

1. The upper reservoir in Hull's Gulch situated at an elevation of approximately 169 feet above Main Street is to be kept constantly filled with water.

2. A steam Pressure of at least sixty pounds is to be constantly maintained in the boilers and pumps at the pumping station near the Natatorium and fires must be continuously kept under the boilers.

3. Telephone service between the fire stations, the Natatorium, the reservoir in Hull's Gulch and the Water Company's office must be maintained by the Water Company. The telephone rentals and fire stations being paid for by the City.

4. The fire alarm system is to be extended to the Natatorium and Hull's Gulch reservoir. The portion of the alarm system outside of the City limits to be paid for and maintained by the Water
9 Company. The Water Company must keep competent persons constantly in charge both at the pumping house and the Hull's Gulch reservoir and at every alarm of fire, unless otherwise directed, immediately cause the gates from the upper Hull's Gulch reservoir to be opened and cause the pressure at the pumps to be increased to 75 pounds or such greater amount as may be hereafter specified by the chief of the fire department; but whenever directed

by the chief of the fire department the gates in the Hulls Gulch reservoir shall be closed and the pressure at the pumping station shall be increased to the limit of its capacity. The persons in charge as above specified must keep within hearing distance of the fire alarm gongs at their respective stations.

5. In all cases when directed by the chief of the fire department the water company must cause the gates to be so closed or adjusted as to confine the water pressure to the immediate locality of the fire. In addition to installing the fire alarm at the pump house and at the Hull's Gulch reservoir the Water Company must cause the persons in charge of said places to be immediately notified of every fire by telephone. The water company must keep 550,000 gallons of water constantly in storage for use in case of fire.

6. The water company must at all times keep its plant including pumps, pipes, reservoirs and hydrants in condition for effective use in case of fire. The duty to make frequent tests of hydrants and to make immediate report of defects to the Mayor and to the Water Company shall however rest upon the fire department.

In prescribing the above conditions the commission has intended to fix a rate for the best service which can be obtained from the present water system and in case that service is not rendered and the standard here fixed maintained no payment shall be made. The rate fixed for water includes the use of water in any necessary fire drills or tests which may be required by the chief of the fire department.

The commission recommends that an ordinance be passed requiring lawn sprinkling to cease during fires and also that the fire alarm system be considerably extended.

Respectfully submitted,

(Signed) EDGAR WILSON,
JOHN McMILLAN,
S. H. HAYS,
JOSEPH PERRAULT,
Commissioners.

Endorsed: Filed August 30, 1909. A. L. Richardson, Clerk.

Answer.

In the Circuit Court of the United States for the District of Idaho, Central Division.

At Law. No. 313.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Answer.

Comes now, defendant, Boise City, a Municipal Corporation, and answering plaintiff's complainant herein, admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs one, two, three and four of plaintiff's said complaint.

II.

Admits that after said ordinances were passed by the Common Council and approved by the Mayor of Boise City, that the grantees of said privilege, to-wit: H. B. and B. M. Eastman, and the Artesian Water & Land Improvement Company, proceeded to supply defendant with water, but as to the allegation that on the 28th of
12 August 1901, or at any other time, plaintiff through divers or other intermediate conveyances or otherwise, became and ever since has been, and now is, the owner of said ordinances, or any rights, privileges or franchises thereby granted, or is the successor in interest in all or any respect of H. B. and B. M. Eastman and of the Artesian Water & Land Improvement Company, or either of them, this defendant has no information or belief sufficient to enable it to answer said allegation and it therefore denies the same and places its denial on that ground. Denies that ever since August 28, 1901, plaintiff has continued to supply, or ever has, supplied water to this defendant or its inhabitants under the authority contained in said ordinances, or otherwise, except as hereinafter specifically alleged.

III.

Denies that on the 11th day of May 1905, or at any other time, pursuant to Section 2711 of the Revised Statutes of Idaho, and the Act approved March 9th 1905, amendatory thereof, both being now embraced in Section 2839 of the Revised Codes, two or any other number of commissioners were appointed by the Mayor and Common Council of the defendant, or that two or any other number of commissioners were within thirty days, or at any other time, thereafter duly appointed by plaintiff for the purpose of determining rates to be charged by plaintiff for water for domestic or other purposes and for fire purposes in Boise City, but alleges the fact to be that the Mayor and Common Council of Boise City pretending to act in accordance with the provisions of Section 2711 of the Revised Statutes of Idaho, and the Act approved March 9, 1905, amendatory thereof, both of which are now embraced in Section 2839 of the Idaho
13 Revised Codes, appointed two persons and defendant within thirty days thereafter appointed two persons for the alleged purpose of determining rates to be charged by plaintiff for water for domestic and other purposes and also for fire purposes in said Boise City, but defendant denies that the said Mayor and Common Council had any authority whatever to appoint said or any persons or commissioners under the provisions of the statute referred to, and denies that said statute has any application whatever to defendant, Boise City, for the reason that said defendant was organized under a special act of the Legislature of the Territory now the State of Idaho long prior to the enactment of said statute, and ever since its organization continued and still continues to exist as a municipal

corporation of the then territory and now State of Idaho under and by virtue of said special act of said Legislature and Acts amendatory thereto.

IV.

Denies that the said four or any commissioners, duly or otherwise met within ninety days, or within any other period from the date when the said pretended board of water commissioners was complete. Denies that they immediately or otherwise adopted a schedule of rates to be charged by plaintiff for all purposes, as required by statute, or otherwise, including rates to be paid by defendant to plaintiff for water for fire purposes. Denies that said or any schedule of rates adopted by said or any board of water commissioners went into effect August 1, 1905, or at any other time, or that said rates have ever since, or at all, been in full force and effect, or full force or effect, but alleges the fact to be that four persons pretending to act as commissioners met and adopted a pretended schedule of rates to
14 be charged by plaintiff for all purposes, but denies that said rates were fixed as required by statute. Denies that said or any schedule of rates adopted by said pretended board of water commissioners went into effect August 1, 1905, or any other time, or that they or any other rates have been ever since, or at all, or now are in full force or effect.

V.

Denies that a Board of Water Commissioners fixed and established or fixed or established a rate to be paid by the defendant to plaintiff in the words and figures set forth in paragraph 8 of plaintiff's complaint, or otherwise, or at all, but alleges the fact to be that a pretended board of water commissioners pretended to fix a rate to be paid by the defendant to the plaintiff in the words and figures set forth in paragraph 8 of said complaint. Admits that a copy of said pretended supplemental report containing the conditions referred to in said paragraph 8, is annexed to and made a part of plaintiff's complaint, marked Exhibit "A."

Admits that the number of fire hydrants in use by the City at the time of the pretended adoption of rates referred to was 90 and that 11 additional hydrants were thereafter installed, but denies that said hydrants or any of them were at any time used in any manner or at all, except as hereinafter specifically alleged.

Denies that the plaintiff has at all times, or at any time, since said pretended rates were determined by the pretended board of commissioners, maintained the required or any other kind of pressure for fire or any other purpose or that plaintiff complied with all or
15 any of the conditions contained in said pretended report or that plaintiff has at all or any time supplied defendant with water for fire or any other purpose or that defendant has used said or any hydrants to take water from plaintiff's pipes or mains, or any of them, at a large or any number of fires, or that said water or said hydrants were during all or any of the time or still are available for use by defendant for fire or any other purpose except as hereinafter specifically alleged.

VI.

Admits that from August 1, 1905 to May 1, 1906, that defendant aid to plaintiff a sum amounting to $2250.00, and no more, and at since May 1, 1906, defendant has failed, neglected and refused pay plaintiff any further sum whatever for fire purposes, although laintiff has frequently demanded payment from the defendant of e amount plaintiff claimed to be due, and defendant alleges the ct to be that the payment made by it was in the manner and for e purpose as hereinafter specifically alleged.

Denies that there is now due and owing and payable, or due, or wing, or payable from defendant to plaintiff the sum of $9750.00, r any other sum, or anything at all, for fire or any other purpose in ccordance with said pretended or any other rates established by aid pretended board of water commissioners, or otherwise, for 90 r any other number of fire hydrants for three years and three nonths from May 1, 1906, to August 1, 1909, or for any other eriod or for any time at all at the rate of $3000.00, or any other mount, or anything at all, per annum. Denies that the further um of $346.50, for 11 or any other number of additional or other hydrants at $3.50, or any other sum per month for nine or
16 any other number of months or any time at all from November 1, 1908 to August 1, 1909, or for any other period of ime or that the total sum of $10,096.50, or any other sum, or anything at all is due the plaintiff from defendant.

Admits that the amount in controversy in this action exceeds exclusive of interest and costs the sum of $2000.00.

The defendant further answering the plaintiff's complaint filed herein alleges:

That the defendant, Boise City, is now and was for a long time prior to the enactment of said Section 2711 of the Revised Statutes of Idaho and the amendments thereto, and the times mentioned in plaintiff's complaint, a municipal corporattion within Ada County, State of Idaho, organized and existing under and by virtue of a special Act of the Legislature of the Territory of Idaho, now the State of Idaho, and ever since its organization continued and still continues to exist as such municipal corporation.

That as defendant is informed and believes and therefore alleges the fact to be that Section 2711 of the Revised Statutes of Idaho and the Act approved March 9th 1905, amendatory thereof, both being now embraced in Section 2839 of the Revised Codes of Idaho, are general laws of the State of Idaho and have no application to said defendant nor amend the special charter of the defendant, and that the Mayor and Common Council of the defendant did not
17 have any power or authority under said Section 2711 as amended to appoint commissioners for the purpose of determining rates to be charged by plaintiff for water for domestic, fire or other purposes in said Boise City, and that said commissioners so appointed by said Mayor and Common Council of the defendant, as set forth in paragraph 6 of plaintiff's complaint, had no authority or power to adopt a schedule of rates to be charged by the plaintiff for water for domestic, fire or other purposes, nor did they have any

power or authority to fix or establish rates to be paid by the defendant for water for fire purposes, and that the alleged act of the Mayor and Common Council of said defendant appointing said commissioners to act with the alleged commissioners selected by the plaintiff for the purpose of adopting a schedule of rates to be charged by plaintiff for water for fire or any purpose, to be used by the defendant, was ultra vires and void and of no effect whatever.

That the defendant has never at any time granted to the plaintiff or to any of its alleged grantors in said ordinances referred to in its said complaint, authority to furnish to the defendant and charge therefor, water for fire or any other purpose, nor contracted with or demanded of the plaintiff to furnish the defendant water for fire or any other purpose. That between the 1st day of August 1905 and the first day of May 1906 the defendant without any authority of law, and under a mistake in law as to its legal obligation paid to the plaintiff the sum of $2250.00, on a pretended claim of the plaintiff for water for fire purposes, and that thereafter on the 10th day of May 1906, the defendant was informed and believed and upon such information and belief alleges the fact to be that it
18 had no authority under the law to pay to the plaintiff any further sum for water for fire purpose and also that the plaintiff was not furnishing to the defendant or maintaining in its water works system the required pressure for fire purposes as required of it by the pretended supplementary report annexed to the plaintiff's complaint, marked Exhibit "A." And in view of such information and belief the Mayor and Common Council of the defendant on or about May 10th 1906, duly ordered the City Clerk of the defendant to notify the plaintiff not to maintain for or supply to the defendant any pressure for fire purposes as the defendant would not receive or use such service and would not pay to the plaintiff any further sum therefor. That thereafter, to-wit: On or about the 11th day of May 1906, the said clerk of the defensant, in accordance with said order and instructions of the said Mayor and Common Council, duly notified the plaintiff in writing not to maintain for or supply to the defendant any pressure for fire purposes as the defendant would not use or receive any such service and would not pay to the plaintiff any further sum therefor.

The defendant further alleges that the hydrants referred to in plaintiff's complaint were purchased and installed by the defendant with the view of using them for securing water for fire purposes in the event the defendant should ever contract with or demand of the plaintiff to furnish to the defendant water and the required pressure for fire purposes whenever the plaintiff was able and could furnish such required pressure. The defendant upon information and belief alleges that the plaintiff has not at any of the
19 times mentioned in said complaint furnished to the defendant water for fire purposes in the manner and as required of the plaintiff by said pretended supplementary report marked Exhibit "A," annexed to the plaintiff's complaint, and upon which report the plaintiff bases its alleged cause of action set forth in its said complaint, and that the hydrants referred to in said complaint

re not and were not during the times stated in said complaint vailable for use by the defendant for fire purposes under the condi-ions required to be performed by the plaintiff in said pretended upplementary report, marked Exhibit "A" and annexed to plain-iff's complaint.

Defendant further alleges that under the special act incorporating Boise City, entitled: "An Act to incorporate Boise City in Ada County, approved January 11th 1866" Passed by the Territorial Legislature of the Territory of Idaho, it was provided that the Mayor and Common Council of the defendant shall have authority to provide the defendant Boise City with wholesome water and to provide for the prevention and extinguishment of fires and the preservation of property endangered thereby.

That that portion of said act, giving the authority above referred to, has ever since been and still is in full force and effect.

Wherefore Defendant prays that the plaintiff take nothing by its alleged cause of action and that the defendant be hence dismissed with its costs incurred herein.

H. B. KINYON AND
CAVANAH & BLAKE,
Attorneys for the Defendant, Boise City, Residing at Boise, Idaho.

20 STATE OF IDAHO,
County of Ada, ss:

J. A. Blomquist, being first duly sworn on oath, according to law, deposes and says: That he is the duly elected, qualified and acting President of the Common Council of the defendant, Boise City, and as such officer makes this verification for and on behalf of the said defendant; that Joseph T. Pence, the duly elected, qualified and acting Mayor of said defendant is on this date absent from the said Boise City and for that reason affiant makes this verification as President of the Common Council of said defendant. That affiant has read the foregoing answer, knows the contents thereof, and that the facts therein stated are true of his own knowledge, except as to those matters which are therein stated to be on information or belief, and as to those matters he believes it to be true.

J. A. BLOMQUIST.

Subscribed and sworn to before me this 16th day of November, 1909.

[SEAL.] JOHN J. BLAKE,
Notary Public.

21 Service of a copy of the foregoing answer acknowledged this 16th day of November, 1909.

(Signed) JOHNSON & JOHNSON,
Attorneys for the Plaintiff.

Endorsed: Filed November 16, 1909. A. L. Richardson, Clerk.

22 *Motion for Leave to File Amended Answer and Counterclaim.*

In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Motion for Leave to File Amended Answer and Counterclaim and Supplemental Answer and Counterclaim and for Order Shortening the Time for Hearing.

Comes now, the defendant, Boise City, and moves for leave to file amended answer and counterclaim, and supplemental answer and counterclaim, and tenders herewith, for filing, said amended and supplemental answers and counterclaims.

Said Defendant further moves that the time for serving notice of, and hearing the foregoing motion be shortened, and that the hearing of said motion is set for Tuesday, February 13th, at 2 o'clock, p. m.

Dated February 10th, 1912.

P. E. CAVANEY,
CAVANAH, BLAKE & McLANE,
Attorneys for the Defendant.

Endorsed: Filed February 10, 1912. A. L. Richardson, Clerk.

23 *Order of Court Permitting Amendment to Answer by Way of Counterclaim to be Filed.*

At a Stated Term of the United States District Court for the District of Idaho for the Southern Division, Held at Boise, Idaho, on Wednesday, the 14th Day of February, 1912.

Present: Hon. Frank S. Dietrich, Judge.

No. 313.

BOISE ARTESIAN HOT & COLD WATER COMPANY

vs.

BOISE CITY, a Municipal Corporation.

On this day was announced the decision of the court upon defendant's application for leave to file amended and supplemental answer herein, which decision is in writing and on file, and is to the effect and it is hereby ordered that the application to file a supplemental counter claim is denied, but the said defendant is given leave to amend by interposing a counterclaim for the amount due the defendant city at the time the action was commenced.

24 *Verdict.*

United States District Court, Southern Division, District of Idaho.

BOISE ARTESIAN HOT & COLD WATER COMPANY, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Verdict.

We, the jury in the above entitled cause, find for the plaintiff, and assess the damages at the sum of $10,049.95.

HORACE E. YAUREN,
Foreman.

Endorsed: Filed February 22nd, 1912. A. L. Richardson, Clerk.

25 *Judgment.*

In the District Court of the United States, District of Idaho, Southern Division.

BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Judgment.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury returned to consider of their verdict, and subsequently returned into court, and, being called, answered to their names and say they find a verdict for the plaintiff.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged, that said plaintiff have and recover from said defendant the sum of Ten Thousand Forty-nine and 95/100 ($10,049.95) Dollars, with interest thereon, at the rate of seven per cent (7%) per annum, from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $87.00.

Judgment entered February 22, 1912.

26 *Bill of Exceptions.*

In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Bill of Exceptions.

This was an action at law commenced on the 30th day of August, 1909, to recover certain sums claimed to be due for services rendered to the City of Boise by plaintiff for fire protection in accordance with a schedule of rates fixed by water commissioners under a statute of the State. The first Answer filed by defendant was in the nature of a denial only.

First Exception.

On the 13th day of February, 1912, this cause came on for hearing on defendant's motion for leave to file certain Amendments by way of counterclaim to its Answer theretofore filed. Richard H. Johnson, Esq., appearing as counsel for plaintiff and Messrs. Cavanah, Blake and MacLane, appearing as counsel for the defendant. Whereupon the following proceedings were had, to-wit:

The defendant moved the court for leave to file its Amendment to its Answer by way of counterclaim, and tendered for filing its said Amendment and counterclaim which is in words and figures following, to-wit:

27 (Title of Court and Cause.)

"Defendant's Amendment to Answer by Way of Counterclaim.

Comes now, defendant, Boise City, a Municipal Corporation and by leave of the Court first had and obtained, files this, its amendment to the answer heretofore filed herein, and by way of counterclaim to the plaintiff's complaint, alleges:

I.

That the defendant, Boise City, is now and, at all the times hereinafter mentioned, has been a municipal corporation within the County of Ada, State of Idaho, created by and existing under the laws of the State of Idaho.

II.

That the plaintiff is a private corporation organized and existing under the laws of the State of West Virginia, with its principal place of business at Boise City, Ada County, Idaho, and is authorized and

empowered by its articles of incorporation to carry on and conduct a waterworks system and to sell and rent water to the inhabitants of said Boise City.

III.

That on the third day of October, 1889, said Boise City, by its Mayor and Common Council, passed and adopted an ordinance granting to one H. B. Eastman and B. M. Eastman, and their successors in interest in their waterworks, a license for an indefinite period to lay, construct and repair waterpipes in the streets and alleys of said Boise City, through which water is now and at all times herein mentioned, has been furnished by plaintiff and its predecessors in interest in and to said waterworks system to the defendant and the residents and inhabitants of said Boise City for profit, which said ordinance was accepted by the predecessors in interest of said plaintiff in and to said waterworks system, a copy of which said ordinance, approved October 3d, 1889, is as follows, to-wit:

28 *Ordinance No.* 94.

An Ordinance Granting to Eastman Brothers the Right to Lay Water Pipes in Boise City.

The Mayor and Common Council of Boise City, I. T., ordain:

SECTION 1. H. B. Eastman and B. M. Eastman, and their successors in interest in their water works for the supply of mountain water to the residents of Boise City are hereby authorized to lay and repair their water pipes in, through, along and across the streets and alleys of Boise City, under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along or across which they may lay such pipes in as good condition as they shall find the same, and shall at all times promptly repair all damages done by them or their pipes or by water escaping therefrom.

SECTION 2. This ordinance shall take effect from and after its passage and approval.

Passed the Council this 3d day of October, 1889.

Approved:

[SEAL.] JAMES A. PINNEY,
Mayor.

Attest:

C. S. McCONNEL,
City Clerk.

IV.

That the said plaintiff, the Boise Artesian Hot & Cold Water Company, now is and has been for a period of more than six years last past, the successor in interest of the said H. B. and B. M. Eastman, in and to the waterworks system herein referred to, and are now and for more than six years last past, has been engaged in the sale and rental of water for profit from its said water works system to the defendant and residents and inhabitants of Boise City under the provisions of the aforesaid ordinances and licenses.

V.

That the plaintiff, the Boise Artesian Hot & Cold Water Company, and its predecessors in interest in and to its waterworks system, are now and ever since the 3d day of October, 1889 have been using the streets and alleys of said Boise City in the
29 sale and delivery of water to the defendant and the residents and inhabitants of said Boise City through the water pipes of said waterworks system and in laying and repairing said water pipes connected with its said water works system.

VI.

That the defendant, Boise City, on the 7th day of June, 1906, enacted and approved an ordinance of said City, No. 678, entitled: 'An ordinance requiring the Boise Artesian Hot & Cold Water Company, a private corporation, organized and existing under and by virtue of the laws of the State of West Virginia, to pay to Boise City, a municipal corporation of the State of Idaho, on the first day of each and every month, a monthly license of $300.00 for the use and occupancy of the streets and alleys of said Boise City, Idaho, in furnishing water to the residents of said City.'

requiring the said plaintiff, the Boise Artesian Hot & Cold Water Company to pay to said Boise City on the first day of each and every month, a monthly license of three hundred ($300.00) dollars for the use and occupancy of the streets and alleys of said Boise City by the said plaintiff, in the sale and delivery of water to the defendant and the residents and inhabitants of said Boise City through the said water pipes of said plaintiff laid and maintained by said plaintiff in the streets and alleys of said Boise City, and for the privilege granted by the aforesaid Ordinance No. 94, approved October 3, 1889; that in said ordinance No. 678, demand was thereby made by said Boise City of and from the said plaintiff to thereafter pay to said Boise City on the first day of each and every month, said monthly license of $300.00 and the City Clerk of said Boise City was required by the provisions of said Ordinance 678 to notify the said plaintiff of the requirements of said Ordinance No. 678.

VII.

That the whole number of members of the Common Council of the defendant, Boise City, on the 7th day of June, 1906, was twelve (12) members, and that said Ordinance No. 678, after
30 the same was vetoed by the Mayor of the defendant on the 2d day of June, 1906, was thereafter on the 7th day of June, 1906, passed by the common council of said City over the veto of said Mayor by a two-thirds vote cast by the members of the Common Council of said Boise City.

VIII.

That the City Clerk of said Boise City notified the said Boise Artesian Hot & Cold Water Company of the requirements of said

Ordinance No. 678, and from and after the enactment of said Ordinance No. 678, and until this action was begun, demanded of said plaintiff the payment of said monthly license of $300.00 required by said ordinance, but the said plaintiff refused on the first day of each and every month after the enactment and approval of said Ordinance No. 678, until the beginning of this suit, and still refuses and neglects to pay said monthly license or any part thereof to said Boise City.

IX.

That on the 6th day of December, 1906, the defendant by its Mayor and Common Council, passed and approved an ordinance No. 699, requiring and ordering the proper officers of said Boise City to institute an action for and on behalf of said Boise City in any court of competent jurisdiction against the said plaintiff for the enforcement of the provisions of said Ordinance No. 678, and the collection from said defendant of the sum of money due said Boise City from said defendant under the provisions of said ordinance.

X.

That all of the aforesaid ordinances referred to herein are now and ever since their said passage and approval have been in full force and effect and have never been repealed.

XI.

That the said plaintiff, and its predecessors in interest in and to said waterworks system have never at any time paid to said
31 Boise City any compensation for the use and occupancy of said streets and alleys of said Boise City by the said waterworks system of the plaintiff.

XII.

That by reason of the enactment and approval of the aforesaid ordinances, and the use and occupancy of the said streets and alleys of said Boise City by the said plaintiff as aforesaid with its said waterworks system, the plaintiff became and was on the first day of November, 1909, and now is indebted to Boise City in the sum of Twenty four hundred ($2400) Dollars, due as said license.

XIII.

That there is now pending in the United States Supreme Court an action at law brought by said defendant herein against said plaintiff herein for the recovery of the full amount claimed by this defendant to be due and owing to it from said plaintiff herein under said License Ordinance No. 678, between June 7th, 1906, and April first, 1909, and that the defendant herein has demanded of the plaintiff herein to pay said amount due as said license from said first day of April, 1909, to and including November 1st, 1909, but the plaintiff herein refused and neglected to pay the same or any part thereof and that there is now due and owning to the defendant

herein on the first day of November, 1909, as such license the sum of Twenty-four Hundred ($2400.00) Dollars, together with interest thereon at the legal rate as provided by law.

Wherefore the defendant prays judgment against the plaintiff herein for the sum of Two Thousand four hundred ($2400) Dollars, together with interest thereon at the rate provided by law from the time the same became due until paid and for costs incurred herein.

P. E. CAVANEY, *City Attorney;*
CAVANAH, BLAKE & MacLANE,
Attorneys for said Defendant.

Residence, Boise, Idaho.

32 STATE OF IDAHO,
County of Ada, ss:

Harry Fritchman, being first duly sworn for and on behalf of Boise City, the above named defendant, deposes and says: That he has read the amendment to the answer by way of counterclaim, and that he believes the facts therein stated to be true. That the above-named defendant, Boise City, situated in Ada County, Idaho, is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and that affiant is the duly elected, qualified and acting Mayor of said defendant and therefore, as such Mayor, makes this verification for and on behalf of said defendant.

HARRY FRITCHMAN.

Subscribed and sworn to before me this 10th day of February, 1912.

[SEAL.] JOHN J. BLAKE,
Notary Public."

33 Whereupon the plaintiff objected to the filing of the said Amendment to Answer by way of Counter claim on the ground that the ordinance of said Boise City, No. 678, of June 7th, 1906, set forth in the sixth paragraph of said Amendments or Counterclaim, and upon which said counterclaim is based, is in violation of Section 10 of Article I, of the Constitution of the United States in that it is an impairment of the contracts existing between said plaintiff and said defendant, arising from the franchises held and owned by plaintiff and under which plaintiff uses the streets and alleys of said city in supplying water to said city and its inhabitants, and for the further reason that said Ordinance No. 678, would deprive the plaintiff of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, and for the further reason that said Ordinance No. 678 and the enforcing thereof by the defendant, Boise City, would deny to plaintiff the equal protection of the laws contrary to the provisions of said Fourteenth Amendment, and for the further reason that it was beyond the legislative powers of defendant's common council to enact the said ordinance.

Whereupon after argument of counsel, the Court overruled plaintiff's objections and sustained defendant's motion and permitted the

defendant to file said Amendments and Counterclaim covering amounts claimed to be due up to the time of the commencement of this action. To which ruling of the Court, the plaintiff then and there excepted, which exception was duly allowed by the Court.

Second Exception.

That afterwards, to-wit, on the 21st day of February, 1912, the above-entitled action came regularly on for trial before his Honor, Frank S. Dietrich, District Judge, Richard H. Johnson,
34 Esq., appearing as counsel for plaintiff and Messrs. Cavanah, Blake and MacLane appearing as counsel for defendant. A jury having been impaneled, the following proceedings were had:

An opening statement to the jury was made by Mr. Richard N. Johnson on behalf of plaintiff.

A stipulation of facts was filed and read to the jury.

The following is a copy thereof, to-wit:

(Title of Court and Cause.)

Stipulation of Facts.

It is hereby stipulated by and between the above-named parties, through their attorneys, for the purposes of trial of the above-entitled action in the said Court:

First.

That on the third day of October, 1889, the defendant, Boise City, by its Mayor and Common Council passed and adopted the following ordinance, to-wit:

'An Ordinance Granting Eastman Brothers the Right to Lay Water-pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, ordain:

SECTION 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, for the supply of mountain water to the residents of Boise City are hereby authorized to lay and repair their water-pipes, in, through and along and across the streets and alleys of Boise City, under the surface thereof; but they shall, at all times, restore and leave all streets and alleys in, through, along and across which they may lay such pipes in as good condition as they shall find the same, and shall, at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom.

SECTION 2. This Ordinance shall take effect from and after its passage and approval.

Approved October 3, 1889.'

Second.

That under and pursuant to the ordinance set out in paragraph one of this stipulation the said H. B. and B. M. Eastman accepted the same and proceeded immediately to construct a water-
35 works plant and system consisting of artesian wells and reservoirs and laid mains and pipes under and along defendant Boise City's streets and alleys and supplied defendant and its inhabitants with pure mountain water. That during the time the said Eastmans owned said water works system they expended thereon and in the construction thereof $20,000.00.

Third.

That the defendant Boise City on July 10th, 1890, by its Mayor and Common Council passed and adopted the following ordinance, to-wit:

'An Ordinance Granting to the Artesian Water and Land Improvement Company the Right to Lay Water Pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, do ordain:

SECTION 1. The privilege of laying down and maintaining water pipes in the streets and alleys now laid out, or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.

SECTION 2. All water-pipes placed in said streets and alleys shall be laid down in a workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

SECTION 3. This ordinance shall take effect and be in force from and after its passage.

Approved July 10th, 1890.'

Fourth.

That under and pursuant to the ordinance set out in paragraph three of this stipulation the said Artesian Water and Land Improvement Company, accepted the same and proceeded immediately to construct a waterworks plant and system consisting of artesian wells and reservoirs and laid mains and pipes along and under defendant's streets and alleys, and supplied defendant and its inhabitants with pure mountain water.

That during the time the said Artesian Water and Land
36 Improvement Company owned said waterworks system they expended thereon, and in construction thereof over $50,000.00.

That the said Artesian Water, Land and Improvement Company was a corporation duly organized under Chapter V of Title IV of the Civil Code of Idaho, relating to water and canal corporations, for the purpose of supplying said defendant and its inhabitants with water for public and family use.

Fifth.

That on June 7th, 1906, the Common Council of Boise City, passed over the Mayor's veto the following ordinance, to-wit:

No. 678.

'An Ordinance requiring the Boise Artesian Hot and Cold Water Company, a private corporation, organized and existing under and by virtue of the laws of the State of West Virginia, to pay to Boise City, a municipal corporation of the State of Idaho, on the first day of each and every month, a monthly license of $300 for the use and occupancy of the streets and alleys of said Boise City, Idaho, in furnishing water to the residents of said city.

Whereas, Boise City, is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and

Whereas, The Boise Artesian Hot and Cold Water Company, is a private corporation organized, existing and operating under the laws of the State of West Virginia, and

Whereas, said Boise City, on the 3d day of October, 1889, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to pay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city, for profit, and

Whereas, the said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks.

Now, therefore, Boise City does ordain as follows:

SECTION 1. That the said Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1889, in said Boise City, are hereby
37 required to hereafter pay to said Boise City on the first day of each and every month a monthly license of $300 for the privilege granted by said ordinance of October 3, 1889, to lay and repair water-pipes in the streets and alleys of said city through which water is being furnished to the inhabitants of said Boise City by said Company.

SECTION 2. That demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of $300 required by Section I of this Ordinance.

SECTION 3. That the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot & Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

SECTION 4. That nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid Ordinance of October 3, 1889.

SECTION 5. This Ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31st day of May, 1906.

Vetoed by the Mayor June 2d, 1906.

Passed over the Mayor's veto June 7th, 1906, by a vote of 8 Ayes; 3 Noes.'

Sixth.

That none of the foregoing ordinances have been since amended or repealed, but all are in full force and effect.

Seventh.

That some time prior to July 29th, 1905, the plaintiff in this action, the Boise Artesian Hot & Cold Water Company, Ltd., succeeded by transfer, sale and assignment to all the property pertaining to the water system of the H. B. and B. M. Eastmans, and of the Artesian Water and Land Improvement Company, by valid and regular conveyance, and also of all the rights and privileges whatever that were granted to the said Eastmans and the said Artesian Water and Land Improvement Company by the said ordinances, provided said rights and privileges were legally assignable,
38 and since said transfer has expended labor and money in the improvement and extension of the water system of the Eastmans and of the Artesian Water & Land Improvement Company.

Eighth.

That on or about May 11th, 1905, the Mayor and Common Council of the defendant Boise City, appointed two commissioners and the plaintiff the Boise Artesian Hot & Cold Water Company, Limited, appointed two commissioners for the purpose of establishing water rates and charges in said City. That said appointment purported to be made under and pursuant to Section 2711 of the Revised Statutes of Idaho, as amended by the Act approved March 9th, 1905, and said commissioners purporting to act under said section of the statutes, as amended, submitted to the Mayor and Common Council of Boise City, on July 29th, 1905, a report, a copy of which is hereto attached, marked Exhibit "A." And thereafter, on or about the — day of —— presented to the Mayor and Common Council of Boise City a supplementary report, a copy of which is hereto attached, marked Exhibit "B."

Ninth.

That purporting to act under the said report and supplementary report, the plaintiff herein furnished to Boise City and the inhab-

itants thereof, water for general purposes, other than fire purposes; that whether or not any water was furnished for fire purposes under and pursuant to said report or otherwise, and whether or not the said plaintiff complied with any of the terms and conditions of said report in the furnishing of water for fire purposes is not covered by this stipulation and nothing herein contained is to be considered as an admission on the part of the City that such water was furnished for fire purposes either in accordance with said report or supplementary report, or otherwise.

Tenth.

That the ordinance set forth in paragraph Five of this
39 stipulation was immediately after its passage served upon the plaintiff, the Boise Artesian Hot & Cold Water Company, Limited, and the payment of the license fee thereby imposed was demanded of the plaintiff by the defendant, and the city clerk thereupon notified the Boise Artesian Hot & Cold Water Company of the requirements of said ordinance and demanded the payment of the license; and the said license fee has never been paid by the defendant or by any other person for it, and the plaintiff has refused to pay each and every monthly installment of said license fee.

Neither the Eastman Brothers nor the Artesian Water and Land Improvement Company nor the plaintiff have ever paid any pecuniary consideration for the privilege granted to them to use the streets and alleys of the defendant Boise City, and no such pecuniary consideration was ever demanded or required by the defendant Boise City therefor, prior to the passage of the ordinance referred to in the fifth paragraph hereof.

Eleventh.

That the property of the plaintiff and its grantors in the business of supplying water and their waterworks has been duly assessed for all state, county, city and school taxes, in like manner and to the same extent and in the same proportion to the value thereof as all other property in Boise City, and the taxes so assessed have been paid each and every year by the plaintiff and its predecessors in interest.

Twelfth.

That the defendant, Boise City, has not paid the plaintiff any of the sums of money demanded in its complaint.

Thirteenth.

This stipulation is a partial stipulation of facts covering only the
40 matters herein expressly contained and as to all other matters at issue in the case the parties reserve the right, notwithstanding this stipulation, to introduce all competent, relevant and material testimony.

JOHNSON & JOHNSON,
Attorneys for the Plaintiff.
CAVANAH, BLAKE AND MACLANE,
Attorneys for the Defendant."

EXHIBIT "A."

"To the Honorable James A. Pinney, Mayor, and Members of the City Council of Boise City:

GENTLEMEN: We, the undersigned Commissioners, selected under and by virtue of Section 2711 of the Revised Statutes of the State of Idaho, and the Act approved March 9, 1905, amendatory thereof, having been appointed as follows: Samuel H. Hays and John McMillan by the Mayor and Common Council of Boise City, and Edgar Wilson and Joseph Perrault by the Boise Artesian Hot and Cold Water Company, Limited, for the purpose of fixing and determining the rates to be charged for water for domestic, municipal, and other purposes in Boise City, beg leave to submit our report and conclusions thereunder.

The Commission met and organized on the 17th day of May, 1905, by the election of Edgar Wilson as Chairman and John McMillan as Secretary. Many daily sessions of said Commission have been held at which testimony has been taken regarding various items which, in the judgment of the Commission, affect the question of rates to be established for the uses set forth in the law. Official public notices have been given of the time and place of these meetings, and the people generally, as well as the Water Company, have been invited to present evidence to the Commission which would throw light on the investigation and lead to a correct conclusion.

41 The Commission has taken a large amount of testimony touching the value of the plant owned by the Company, the rate of interest on similar investments in Boise City and elsewhere, the expense of operating the plant, the income thereon, the service given the consumer, and all other facts and elements entering into a just determination of the question. This testimony covers one hundred and thirty typewritten pages, besides much more than this in the shape of exhibits and other documentary evidence.

At the request of the Commission Mr. Charles M. Kahn, City Attorney, has appeared at its session as the representative of the City, and has at all times rendered valuable assistance to the Commission in cross-examining witnesses and adducing testimony in behalf of the interests of the City and the consumer of water.

At the request of other citizens the Commission adjourned from time to time for the purpose of enabling them to present any matters which they desired to submit. But no evidence has been offered, brief filed, or facts presented by anyone save by the City authorities and the Water Company, except such as the Commission itself has been able to secure.

After a thorough investigation and due consideration of the same the Commission has come to the following conclusions:

The value of the Water Company's plant is fixed at $240,000. This includes an expenditure of $32,000 in betterments and improvements, now going on and to be completed during the present season.

The rate of net income which the Company is entitled to on this investment is fixed at six per cent. The Company is therefore entitled to $14,400 annually over and above its legitimate expenditure and deteriorations. In order to yield this the Commission has fixed and determined the following rates for the use of water, said rates to be charged monthly except where specified otherwise:

42 *Monthly Water Rates.*

Boise Artesian Hot & Cold Water Company, Ltd.

Meter Rates:

40,000 gal. or less	per 1,000 gal.,	$0.25
More than 40,000 gal. and less than 80,000 gal.	" 1,000 "	.22½
" " 80,000 " " " " 120,000 gal.	" 1,000 "	.20
Over 120,000 gal.	" 1,000 "	.18

The minimum monthly charge for water delivered by meter measurement shall in no case be less than $1.00

Municipal Rates:

Meter rates shall prevail on City Hall, Engine House and other City Buildings.

Meter rates shall be allowed for street washing; the amount of water used for this purpose to be determined by the City authorities and the Water Company.

Street Sprinkling:

$0.01¼ per front or lineal foot per sprinkling.

Fire Hydrants:

$3,000 per annum for the fire hydrants now in use, and $3.50 monthly for each additional hydrant hereafter established, under conditions in supplementary report.

Any other municipal or City use to be by meter rate.

Domestic and Family Use—Residences:

5 rooms or less	1.00
6 "	1.10
7 "	1.25
8 or 9 rooms	1.50
10 or 12 rooms, inclusive	2.00

Over 12 rooms, by meter.

Bath:

First tub in private house	.40
Each additional tub	.25

Water Closet:

First inside closet in private house	.35
Each additional closet	.25

Closet outside but connected with private house	.50
Urinals, private house	.25
Closet in private house without other use of water	.50

Lawn and Parking Sprinkling:

$0.02¼ per square yard per season. The lawn sprinkling season being from April 1st to October 31st. Space covered by buildings and sidewalks not included. Service not less than four hours with at least 30 pounds pressure.

43 General Purposes:

Bakeries	$1.50 to 3.00
Barber Shops:	
First chair	1.00
Each additional chair	.25
Blacksmith shops:	
First forge	1.00
Each additional forge	.25
Boarding House	$2.00 to 4.00
Book Binderies	By Meter
Breweries	By Meter
Brick Yards	By Meter
Butcher Shops	2.00
Business Blocks:	
First Floor (See Stores).	
Upper Floors, First five rooms	1.00
Each additional room	.10
Building Purposes:	
Each 1,000 brick laid	.10
Plastering, per sq. yard	.005
Cement and lime, per barrel	.10
Stone, per perch, laid	.05
Concrete side-walks, per sq. yard	.05
Candy Manufactory	$1.00 to 2.00
Cigar Manufactory	1.00 to 2.00
Club Rooms	2.00 to 3.00
Churches	1.00 to 2.00
Chinese Quarters	By Meter
Corrals	By Meter
Filling Cisterns	By Meter
Fountains	By Meter
Foundries	By Meter
Government, State and County Buildings	By Meter
Hose Connections:	
For sprinkling side-walks and washing fronts; for each 25-foot front, or less	.50
Hotels	By Meter
Hydraulic Elevators	By Meter
Laboratories	By Meter
Livery and Feed Stables	By Meter
Locomotives	By Meter

Machine Shops	By Meter
Manufactories	By Meter
Offices	1.00
Packing House	By Meter
Printing Office (not including boilers)	2.00
Public Halls	1.00 to 3.00
Photograph Galleries	2.00 to 3.00
Restaurants	3.00 to 5.00
Schools	By Meter
Soda Fountains:	
First jet	1.00
Each additional jet	.50
Tumbler Washers	.50
Stables—Private:	
One or two animals	.50
Three to four animals (inclusive)	1.00
Each additional animal	.25
Steam-boilers	By Meter
Stores:	
Drug Stores	1.50 to 2.00
Other retail stores, 25 ft. front or less	1.00
Each additional 25 feet	.50
Wholesale Liquor Store	2.00
44 Saloons	3.00
Soda Manufactory	By Meter
Water Motors	By Meter
Baths, Water Closets and Urinals (not in Private Houses):	
Hotels:	
First tub	2.00
Each additional tub	1.00
Boarding Houses:	
First tub	1.00
Each additional tub	.50
Barber Shops:	
Each tub	3.00
Hotels:	
First Closet	2.00
Each additional Closet	1.00
Boarding Houses:	
First Closet	1.00
Each additional Closet	.50
Barber Shops:	
First Closet	1.00
Each additional Closet	.50
Saloons:	
First Closet	2.00
Each additional Closet	1.00
Stores:	
First Closet	1.00
Each additional Closet	.50

Corrals:	
First Closet	1.00
Each additional Closet	.50
Closets outside of buildings (not private houses)	1.00
Hotels and Saloons:	
First urinal	.50
Each additional urinal	.25

In fixing the foregoing rates the Commission has labored under great difficulties owing to the fact that it was almost impossible to secure the necessary definite information on the subject.

Under the law above referred to, it is the duty of the Commission to fix rates for municipal as well as domestic uses. Prior to the enactment of this law the Company has been required to furnish water free for fire purposes and for sprinkling and washing streets. The rate fixed for these municipal purposes by the Commission will yield the Company annually about $8,500 for this service. In return for this the Commission has felt called upon to make a reduction to the private consumer for domestic use. Accordingly a cut has been made on the domestic rates heretofore in force as follows:

The meter rate has been reduced	37½	per cent
The flat rate for five room house, without bath or closet, has been reduced	20	" "
45 Five room house with bath and closet	22	per cent
Six room house " " " "	18	" "
Seven room house " " " "	20	" "
Eight or nine room house with bath and closet	10	" "
Ten to twelve room house " " " "	9	" "
The lawn sprinkling rate per 50 ft. lot with average size building thereon, has been reduced	20	" "
Flat rate for vacant lot, practically unchanged.		

The Commission has received reports from seventy cities throughout the United States, of similar population to Boise, regarding prices charged for fire purposes. These prices range in these seventy towns and cities from a minimum of $20 to a maximum of $79.75 annually per hydrant, with an average annual charge per hydrant, in the entire seventy cities, of $44.00. The Commission has fixed the rate for Boise at $33.33 1/3 annually per hydrant now in use, with a charge of $3.50 per month for each additional hydrant.

In this connection the Commission desires to earnestly recommend an increased use of meters. The evidence produced before the Commission tends to show a waste of at least 60 per cent of the water pumped into the system; and such waste is the experience of other cities where meters are not used.

In order to encourage the use of meters the Commission has made the very heavy reduction of 37½ per cent in the rates thus charged. There are several meters on lawn service now in use in the City. The meter rate now fixed will unquestionably cause a large saving to the consumer of water, whether for domestic purposes or for lawn

sprinkling, and at the same time result advantageously to the Company. Economy in the use of water will thus result advantageously both to the Company and the consumer.

In establishing these rates the Commissioner has made the heaviest reduction on the flat rate to the smaller consumer for the
46 reason that water is an absolute necessity, and the smaller consumer and occupant of the smaller house is usually the one least able to pay.

In making a sliding scale of meter rates the Commission has kept closer to a uniform rate, regardless of the amount used, than has been the rule adopted in most cities. The cost of delivering a thousand gallons into the pipes of the system does not substantially vary, and there is no reason why the larger consumer should enjoy such an advantate as has heretofore been given in this City, and elsewhere, and for that reason the Commission has deemed it wise to bring the maximum and minimum meter rate much closer together.

In conclusion the Commission desires to say that its members have endeavored to do justice to the people, the City and the Water Company. We have come to a unanimous agreement regarding these rates after long and careful investigation, and we believe that these reates will yield the Company, notwithstanding the reduction we have made, a reasonable return upon the value of its plant, not less than six per cent, annually, over and above its necessary expenditures. At the same time we believe the rates we have established will be fair and just to the consumer. To make them lower would, in our opinion, confiscate the Company's property, which the law does not permit.

In fixing this schedule of rates the Commission indulges the hope that both the people and the stockholders of this Company will recognize the fact that their best interests are mutual and can never be antagonistic; that as Boise City grows the Water Company should grow and its plant increase in value and usefulness, the consumer always receiving the lowest possible rate for the service rendered, consistent with a reasonable return upon the value of the
47 company's plant.

Respectfully submitted,

EDGAR WILSON,
JOHN McMILLAN,
S. H. HAYS,
JOSEPH PERRAULT,
Members Boise City Water Commission."

Dated Boise City, Idaho, this 29th day of July, 1905.

(Exhibit "B" appears in full as an Exhibit to Plaintiff's Complaint, ante.)

Thereupon the plaintiff introduced all of its oral and documentary evidence and rested and the defendant introduced certain evidence. Attorneys for both sides waived argument to the jury and the attorneys for defendant thereupon stated that the defendant's counter-

claim, including interest, amounted to $1783.40 up to the date of the commencement of the action, which amount was agreed upon by attorneys for both sides as correct, and attorneys for defendant requested the Court to allow the same and to instruct the jury to find for the defendant for this amount based on the said counterclaim. Plaintiff's attorney thereupon objected to the allowance of the counterclaim and to the giving of the instructions to the jury requested by defendant on the ground that the said counterclaim consisted entirely of moneys claimed to be due to the defendant from plaintiff under Ordinance No. 678, of said City of Boise, passed June 7th, 1906, and that this ordinance was null and void for the reason that it is in violation of Section 10 of Article I of the Constitution of the United States in that it is an impairment of the contracts existing between plaintiff and defendant arising by virtue of the franchises held by plaintiff for the use of defendant's streets and alleys in the supplying of water to defendant and its inhabitants; and for the further reason that said ordinance No. 678 would operate to deprive the plaintiff of its property, without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States; and for the further reason that said
48 Ordinance No. 678 denies to plaintiff the equal protection of the laws contrary to said Fourteenth Amendment, and on the further ground that it was beyond the legislative powers of the Common Council of said Boise City to enact said Ordinance No. 678.

These objections were thereupon overruled by the Court, to which ruling of the Court the counsel for the plaintiff then and there duly excepted, which exception was duly allowed by the Court.

Third Exception.

The Court then proceeded to charge the jury and in the course of the charge to the jury the Court instructed the jury as follows:

"The City has filed an answer to this complaint, admitting certain of the allegations and denying others, and also affirmatively setting up what in law we call a counter-claim, by which it claims from the Water Company compensation for the use of its streets, the compensation being called a license fee, at the rate of $300.00 a month from a certain date, the date of the publication of the ordinance or resolution requiring such license fee to be paid. I will say to you now in this connection that it is your duty to find in favor of the city for the full amount of this license claimed, together with interest thereon, the amount, including the interest, being agreed upon as $1783.40. In other words, the City is entitled to recover that amount from the Water Company, and the only question with you will be whether judgment is to be awarded to the City for that amount, or whether it is to be credited upon the amount, if any, due from the City to the Water Company for this water service. In other words, if, under the evidence and the instructions which I shall give you upon that phase of the case, you find that the City owes the Company for water service, then you will just credit upon

that amount this $1783.40. If, upon the other hand, you find nothing is due from the City to the Water Company for water service, your verdict should be in favor of the City for $1783.40, so that judgment can be entered upon such verdict. I think that is all that it is necessary to say upon that point."

That the foregoing embraces all of the charge to the jury relating to said counterclaim. To which portion of said charge to the *the* jury counsel for plaintiff then and there and before said jury retired, duly excepted, on the ground that the counterclaim mentioned in said charge was based upon Ordinance No. 678 of said Boise
49 City passed June 7th, 1906, and that said ordinance was in violation of Section 10 of Article I of the Constitution of the United States in that it was an impairment of the contracts existing between said plaintiff and said defendant arising out of the franchises held and owned by plaintiff for the use of defendant's streets in the supplying of water to defendant and its inhabitants, and for the further reason that said ordinance No. 678 would operate to deprive the plaintiff of its property without due process of law and deny to plaintiff the equal protection of the law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States; and for the further reason that it was beyond the legislative powers of the Common Council of said defendant to enact said ordinance No. 678.

Counsel for both sides then agreed that the total amount claimed to be due to plaintiff upon the cause of action set forth in the complaint was $11,833.35.

The jury then retired and after a short absence returned into Court with a verdict in favor of plaintiff for the sum of $10,049.95, which was the total amount, including interest, claimed by plaintiff for fire services between May 1, 1906 and May 1, 1909, after deducting the sum of $1783.40, the full amount of the counterclaim embraced in defendant's Amendment to its Answer. This verdict was rendered in the 22nd day of February, 1912, and judgment in accordance therewith was duly entered.

And now, in furtherance of justice and that right may be done, the plaintiff presents the foregoing as his bill of exceptions in this case and prays that the same may be settled and allowed and signed and certified by the Judge as provided by law.

JOHNSON & JOHNSON,
Attorneys for Plaintiff.

50 Service of the foregoing proposed Bill of Exceptions admitted this 1st day of March, 1912.

CAVANAH, BLAKE & McLANE,
Attorneys for Defendant.

It is hereby stipulated and agreed that the foregoing Bill of Exceptions may be settled and allowed.

JOHNSON & JOHNSON,
Attorneys for Plaintiff.
CAVANAH, BLAKE & McLANE,
Attorneys for Defendant.

March 1st, 1912.

The above and foregoing Bill of Exceptions is settled and allowed this 1st day of March, 1912.

FRANK S. DIETRICH, *Judge.*

Endorsed: Filed March 1st, 1912. A. L. Richardson, Clerk.

51 *Petition for Writ of Error.*

In the District Court of the United States for the District of Idaho, Southern Division.

At Law. No. 313.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Petition for Writ of Error.

And now comes Boise Artesian Hot & Cold Water Company, Limited, plaintiff herein and says:—

That in the record and proceedings in said cause, and in the verdict of the jury and the rendition of the judgment on the 22d day of February, 1912, in the above-entitled cause in said District Court of the United States for the District of Idaho, Southern Division, manifest error hath happened to the prejudice of this plaintiff, all of which will more fully and in detail appear from the assignment of errors which is filed with this petition.

Wherefore the plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

JOHNSON & JOHNSON,
Attorneys for Plaintiff.

Endorsed: Filed March 2, 1912. A. L. Richardson, Clerk.

52 *Assignment of Errors.*

In the District Court of the United States for the District of Idaho, Southern Division.

At Law.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Assignment of Errors.

The plaintiff in this action, in connection with his petition for a writ of error makes the following assignment of errors which it avers occurred upon the trial of the cause, to-wit:

I. The Court erred in permitting the defendant to file its Amendments to its Answer by way of Counterclaim, over the plaintiff's objection that the Ordinance No. 678 of Boise City, adopted June 7, 1906, and upon which said counterclaim was based, was in violation of Section 10 of Article I of the Constitution of the United States in that it impaired the contracts existing between plaintiff and defendant growing out of the franchises under which plaintiff uses the streets and alleys of said city in supplying water to said city and its inhabitants; and that said Ordinance No. 678 would deprive plaintiff of its property without due process of law and deny to plaintiff the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, and that it was beyond the legislative powers of the defendant's Common Council to enact such ordinance.

II. The Court erred on the trial of said cause in allowing
53 defendant's counterclaim based upon said Ordinance No. 678, and in instructing the jury to find for the defendant for the amount of said counterclaim, to-wit, the sum of $1783.40, alleged to be due at the time of the commencement of the action, and erred in not sustaining plaintiff's objection to such allowance and instruction on the ground that said Ordinance No. 678 is in violation of Section 10, Article I of the Constitution of the United States in that it impairs the contracts existing between the plaintiff and defendant for the use of defendant's streets and alleys in supplying water to defendant and its inhabitants, and also deprives plaintiff of its property without due process of law and denies to plaintiff the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States, and that it was beyond the legislative powers of the defendant's common council to enact said Ordinance No. 678.

III. The Court erred in using the following language in the charge to the jury:

"The City has filed an answer to this complaint, admitting certain of the allegations and denying others, and also affirmatively setting

up what in law we call a counter-claim, by which it claims from the water company compensation for the use of its streets, the compensation being called a license fee, at the rate of $300.00 per month from a certain date, the date of the publication of the ordinance or resolution requiring such license fee to be paid. I will say to you now in this connection that it is your duty to find in favor of the city for the full amount of this license claimed, together with interest thereon, the amount, including the interest, being agreed upon as $1783.40. In other words, the City is entitled to recover that amount from the Water Company, and the only question with you will be whether judgment is to be awarded to the City for that amount, or whether it is to be credited upon the amount, if any, due from the City to the Water Company for this water service. In other words, if, under the evidence and the instructions which I shall give you upon that phase of the case, you find that the City owes the Company for water service, then you will just credit upon that amount this $1783.40. If, upon the other hand, you find nothing is due from the City to the Water Company for water service, your verdict should be in favor of the City for $1783.40, so that judgment can be entered upon such a verdict. I think that is all that it is necessary to say upon that point."

54 Wherefore the plaintiff prays that the judgment of the District Court may be reversed or modified with respect to so much thereof as was adjudged to be due from plaintiff to defendant upon said counterclaim.

JOHNSON & JOHNSON,
Attorneys for Plaintiff.

Endorsed: Filed March 2, 1912. A. L. Richardson, Clerk.

55 *Order Allowing Writ of Error.*

In the District Court of the United States for the District of Idaho, Southern Division.

At Law.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Order Allowing Writ of Error.

This 2nd day of March, 1912, comes the plaintiff by *his* attorney, and files herein and presents to the Court *his* petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by *him*, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court

the United States, and that such other and further proceedings ay be had as are proper in the premises.

On consideration whereof the court does allow the writ of error, pon the plaintiff giving bond according to law in the sum of five undred ($500) dollars.

(Signed) FRANK S. DIETRICH, *Judge.*

Endorsed: Filed March 2nd, 1912. A. L. Richardson, Clerk.

Bond on Writ of Error.

the District Court of the United States for the District of Idaho, Southern Division.

HE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Bond on Writ of Error.

Know all men by these presents, That we, The Boise Artesian Hot Cold Water Company, Limited, a Corporation, as principal, and imothy Regan and Hosea B. Eastman, of Boise, County of Ada, ate of Idaho, as sureties, are held and firmly bound unto Boise ity, a municipal corporation of the State of Idaho, in the full and st sum of Five Hundred dollars ($500), to be paid to the said oise City, its certain attorneys, successors or assigns, to which pay- ent well and truly to be made, we bind ourselves, our heirs, ex- utors and administrators, jointly and severally, firmly by these resents. Sealed with our seals and dated this 4th day of March, in e year of our Lord, one thousand nine hundred and twelve.

Whereas, lately at a session of the District Court of the United tates for the District of Idaho, Southern Division, in a suit pend- g in said Court between The Boise Artesian Hot & Cold Water ompany, Limited, plaintiff, and Boise City, defendant, a final judg- ent was rendered against the said plaintiff based on a counterclaim led by the said defendant, and the said The Boise Artesian Hot & old Water Company, Limited, plaintiff, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said Boise City is about to be issued, citing and admonishing it to be and appear at a ses- on of the Supreme Court of the United States, to be holden at the ity of Washington, on the first day of May, 1912, next,

Now, the condition of the above obligation is such that if the said oise Artesian Hot & Cold Water Company, Limited, shall prosecute id writ of error to effect, and answer all damages and costs if it fail

to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED,
By C. W. MOORE, *Its President.*

Attest:
B. S. HOWE,
Secretary.

TIMOTHY REGAN. [SEAL.]
HOSEA B. EASTMAN. [SEAL.]

Sealed and delivered in the presence of:
J. E. CLINTON, JR.

STATE OF IDAHO,
County of Ada, ss:

Timothy Regan and Hosea B. Eastman, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says that he is a resident and householder in said County and State and is worth the sum in said undertaking specified as the penalty thereof, over and above all his just debits and liabilities, exclusive of property exempt from execution.

TIMOTHY REGAN.
HOSEA B. EASTMAN.

Subscribed and sworn to before me this 4th day of March, 1912.
[NOTARIAL SEAL.] B. W. WALKER,
Notary Public.

(Approved:
DIETRICH, *Judge.*
March 4, 1912.)

Endorsed: Filed March 4, 1912. A. L. Richardson, Clerk.

58 In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,
VS.
BOISE CITY, a Municipal Corporation, Defendant.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Judges of the District Court of the United States for the District of Idaho, Southern Division, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before

ou, between The Boise Artesian Hot & Cold Water Company, mited, plaintiff, and Boise City, defendant, a manifest error has appened, to the great damage of the said The Boise Artesian Hot Cold Water Company, Limited, as by its complaint appears; we, ing willing that the error, if any has been, should be duly cor- cted, and full and speedy justice done to the parties aforesaid in is behalf, do command you, if judgment be therein given, that nder your seal, distinctly and openly, you send the record and pro- edings aforesaid, with all things concerning the same, to the Su- reme Court of the United States, together with this writ, so that you ay have the same at the city of Washington within sixty days from the day of signing the citation, in the said Supreme Court, to be then and there held, that, on the record and proceedings aforesaid being inspected, the said Supreme Court may cause rther to be done to correct that error, what of right, and according the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the nited States, the fifth day of March, in the year of our Lord one ousand nine hundred and twelve, and of the independence of the nited States of America the one hundred and thirty-sixth.

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON,
Clerk of the District Court of the United States for the District of Idaho, Southern Division.

Allowed by
FRANK S. DIETRICH,
District Judge.

[Endorsed:] No. 313. In the District Court of the United States for the District of Idaho, Southern Division. The oise Artesian Hot & Cold Water Company, a Corporation, Plaintiff, . Boise City, a Municipal Corporation, Defendant. Writ of Error. iled March 5, 1912. A. L. Richardson, Clerk. Johnson & John- n, 112 N. 6th street, Boise, Idaho.

In the District Court of the United States for the District of Idaho, Southern Division.

HE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Citation.

HE UNITED STATES OF AMERICA,
District of Idaho, ss:

o Boise City, Greeting:

You are hereby cited and admonished to be and appear at a upreme Court of the United States, to be holden at the city of

Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Idaho, Southern Division, wherein The Boise Artesian Hot & Cold Water Company, Limited, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Boise, in the District above named, this fifth day of March, in the year of our Lord one thousand nine hundred and twelve

[Seal United States District Court, Idaho, 1890.]

FRANK S. DIETRICH,
Judge of the District Court of the United States for the District of Idaho, Southern Division.

Attest:
A. L. RICHARDSON,
Clerk of said Court.

Service of the foregoing Citation, together with the Writ of Error issued herein and receipt of Copies thereof, is hereby admitted this fifth day of March, 1912.

CAVANAH, BLAKE & MACLANE,
Attorneys for Defendant in Error.

62 [Endorsed:] No. 313. In the District Court of the United States for the District of Idaho, Southern Division. The Boise Artesian Hot & Cold Water Company, a Corporation, Plaintiff, vs. Boise City, a Municipal Corporation, Defendant. Citation. Filed March 5, 1912. A. L. Richardson, Clerk. Johnson & Johnson, 112 N. 6th Street, Boise, Idaho.

63 *Stipulation as to What Shall Constitute Record.*

In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Stipulation as to What Shall Constitute Record.

The above-named parties through their counsel hereby stipulate and agree, in accordance with Rule 8, paragraph I, of the Rules of the Supreme Court promulgated December 22, 1911, that the transcript of record on writ of error from the Supreme Court heretofore allowed upon the application of plaintiff, shall consist of the following portions of the record only:—

1. The Complaint.
2. The Answer.
3. Defendant's motion for leave to file Amendment to Answer by way of Counterclaim.
4. Order of Court permitting Amendment to Answer by way of Counterclaim to be filed.
5. Amendment to Answer by way of Counterclaim (contained in Bill of Exceptions).
6. Stipulation of Facts (contained in Bill of Exceptions).
7. All that portion of the Court's charge to the Jury relating to the defendant's Counterclaim and plaintiff's exceptions thereto (contained in Bill of Exceptions).
8. The Verdict of the Jury.
9. The judgment.
10. The Plaintiff's Bill of Exceptions.
11. Petition for Writ of Error.
12. Assignment of Errors.
13. Order Allowing Writ of Error.
14. Bond on Writ of Error.
15. Writ of Error.
16. Citation.
17. Return to Writ of Error.
18. Stipulation as to What Shall Constitute Record.
19. Certificate of Clerk to Record.

Dated March 5, 1912.

JOHNSON & JOHNSON,
Attorneys for Plaintiff.
CAVANAH, BLAKE & McLANE,
Attorneys for Defendant.

Endorsed: Filed March 5, 1912. A. L. Richardson, Clerk.

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States, and the same is transmitted accordingly.

Attest:

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON, *Clerk.*

66 *Clerk's Certificate.*

In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

I, A. L. Richardson, Clerk of the District Court of the United States, in and for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 67 inclusive, contain true and correct copies of the Complaint, Answer, Defendant's motion for leave to file Amendment to Answer by way of Counterclaim, Order of Court permitting Amendment to Answer by way of Counterclaim to be filed, Amendment to Answer by way of Counterclaim (contained in Bill of Exceptions) Stipulation of Facts (contained in Bill of Exceptions), All that portion of the Court's charge to the jury relating to the defendant's counterclaim and plaintiff's exceptions thereto (contained in Bill of Exceptions), the Verdict of the Jury, Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Bond on Writ of Error, Writ of Error, Citation, Return to Writ of Error, Stipulation as to what shall constitute Record and Clerk's Certificate, in the above entitled cause, which together constitute the transcript of the record and return to the annexed writ of error.

67 I further certify that the cost of the record herein amounts to the sum of $45.20, and that the same has been paid by the Plaintiff in error.

Witness by hand, and the seal of said District Court, affixed at Boise, Idaho, this 6th day of March, 1912.

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON, *Clerk.*

a To the Supreme Court of the United States.

BOISE CITY, *a* Municipal Corporation, Appellant,
vs.
BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Appellee.

Transcript.

P. E. Cavaney, Esq., Messrs. Cavanah, Blake & MacLane, Boise, Idaho, Attorneys for the Appellant.
Messrs. Johnson & Johnson, Boise, Idaho, Attorneys for the Appellee.

1 *Bill of Exceptions.*

In the Circuit Court of the United States for the District of Idaho, Central Division.

At Law. No. 313.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Be it remembered that on the 26th day of November, 1909, this cause came on for hearing on plaintiff's motion to strike out certain parts of the defendant's answer. Johnson & Johnson appearing as counsel for the plaintiff and Cavanah & Blake and F. B. Kenyon, appearing as counsel for the defendant. Whereupon the following proceedings were had to wit;

Plaintiff moved the Court that the following portions of the defendant's answer be stricken out, to wit;

All the denials in paragraph or allegation numbered eleven from the word "but" on the 5th line of said allegation to the end thereof. All of paragraphs or allegations of said answer numbered three and four, the first twelve lines of the fifth allegation, and commencing with the tenth line on page six of said answer to and including all of the allegations thereof down to the word "and" after the word "purposes" on the third line from the top of page eight thereof.

Also all that portion of said answer commencing with the
2 ninth line from the bottom of page eight thereof, down to and including the word "pressure" before the word "the" on the third line from the bottom of said page eight.

Whereupon after argument of counsel the court sustained said motion to strike out the following portion of defendant's answer, to wit: All of paragraph 3. To which ruling of the court defendant then and there excepted, which exception was duly allowed by the Court.

Specifications of Error.

Defendant specifies the following errors as made by the court and will urge the same as grounds why said order should be reversed.

1. For the reason that the matters set forth in the allegations stricken out were material allegations and set forth a proper legal defense to plaintiff's action.

The above and foregoing Bill of Exceptions is hereby presented for settlement by counsel for the defendant as their Bill of Exceptions in said cause.

CAVANAH & BLAKE,
Att'ys for the Defendant.

Rooms 1, 2, and 3, Pioneer Bldg., Boise, Idaho.

Service of the foregoing proposed bill of exceptions admitted this 6th day of December, 1909.

JOHNSON & JOHNSON,
Attorneys for the Plaintiff.

3 It is hereby stipulated and agreed that the foregoing Bill of Exceptions may be settled and allowed as of Dec. 6, 1909.

JOHNSON & JOHNSON,
Attorneys for the Plaintiff.
CAVANAH & BLAKE,
Attorneys for the Defendant.

December 6th, 1909.

Upon the foregoing stipulation the above Bill of Exceptions is settled and allowed, and that it be filed as of December 6, 1909.

FRANK S. DIETRICH, *Judge.*

April 15th, 1912.

Endorsed: Filed December 6, 1909. A. L. Richardson, Clerk.

4 *Bill of Exceptions.*

In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

v.

BOISE CITY, a Municipal Corporation, Defendant.

Be it remembered that this cause having been set for trial on February 20th, 1912, by order of the above entitled Court, dated February 5th 1912, the defendant therein, Boise City, on the 10th day of February, 1912, filed in the Clerk's office and presented to the Judge of said Court, the following motion, to wit:

5 In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Motion for Leave to File Amended Answer and Counterclaim and Supplemental Answer and Counterclaim, and for Order Shortening the Time for Hearing.

Comes now, the defendant Boise City, and moves for leave to file amended answer and counterclaim, and supplemental answer and counterclaim, and tenders herewith, for filing, said amended and supplemental answers and counterclaims.

Said defendant further moves that the time for serving notice of, and hearing the foregoing motion be shortened, and that the hearing of said motion is set for Tuesday February 13th, at 2 o'clock, P. M.

Dated February 10th, 1912.

CAVANAH, BLAKE & MACLANE,
Attorneys for the Defendant.

Endorsements: Boise Artesian Hot & Cold Water Co. v. Boise City. Motion for leave to file answer, supplemental answer and counterclaim. Filed February 10th, 1912. A. L. Richardson, Clerk. Cavanah, Blake & MacLane, Att'ys for the defendant.

6 And that upon the presentation of said motion said Judge made, and there was filed in the Clerk's office in said action the following order:

In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corp.,
Plaintiff,
vs.
BOISE CITY, a Municipal Corp., Defendant.

Order Fixing Time for Hearing Motion.

Good cause appearing therefor, it is hereby ordered that the motion for leave to file amended, and supplemental answers and counterclaims in the above entitled cause, be set for Tuesday, February 13th, at 2 o'clock P. M. and that notice of said hearing, served this day, shall be deemed sufficient and due notice of said motion and hearing thereon.

Dated February 10th, 1912.

F. S. DIETRICH,
U. S. District Judge.

Endorsements: Title Court and Cause. Order fixing time for motion. Filed February 10th, 1912. A. L. Richardson, Clerk. Cavanah, Blake & MacLane, Att'ys for defendant.

7 That accompanying said motion heretofore mentioned, the plaintiff filed in said Clerk's office the following affidavit:

In the United States District Court for the District of Idaho, Southern Division.

BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corp., Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Affidavit.

STATE OF IDAHO,
County of Ada, ss:

C. C. Cavanah, being first duly sworn deposes and says: That he is one of the attorneys for the defendant herein, and has been one of such attorneys from the time of the commencement of this action. That at the time this action was commenced there was pending in the Circuit Court of the United States, an action wherein this defendant Boise City, was plaintiff, and this plaintiff, The Boise Artesian Hot & Cold Water Company, was defendant. That in said action, the plaintiff therein sued to recover from the defendant the amount of license fees under the ordinance set up in the proposed amended answer and counterclaim and supplemental answer and counterclaim; that liability under said ordinance was denied by this plaintiff, the defendant in said action. That said action has since been tried, and the liability of this plaintiff, the defendant in said action, adjudicated and determined in favor of this defendant, the plaintiff in said other action by judg-
8 ment to the Circuit Court of Appeals for the 9th Circuit, and from that judgment this plaintiff, the defendant in said action, has taken out a writ of error, which is now pending in the Supreme Court of the United States. That the trial of this action has been postponed from term to term awaiting final determination of said other action. That this cause was set for trial by order of the Judge of this Court made on February 5th 1912. That at the time of filing the original answer in this cause, it was not known whether the ordinance referred to in the proposed amended and supplemental answers and counterclaims would be sustained by the Courts or not and for that reason the matters and claims asserted in the proposed amended and supplemental answers and counterclaims were not inserted in the original answer. That this defendant has delayed in filing amended and supplemental answers and counterclaims until this action should be set for trial, for the reason that until said cause should be set for trial, it would be and was unknown to the defendant and its attor-

neys how much money would be due to this defendant from this plaintiff under the said license ordinance. That this cause now having been definitely set for trial, said amount is determined and is demanded by this defendant under said proposed amended and supplemental answers and counterclaims. That said amended and supplemental answers and counterclaims are not intended to delay the trial of this cause, and introduce no issue upon which the plaintiff in this cause could be surprised by or unprepared for, as such matters are and have been thoroughly familiar to the plaintiff herein for several years last past. That the allowance of the proposed amended and supplemental answers and counterclaims will obviate the institution of another action in the future by this defendant against the plaintiff herein, and will prevent multiplicity of action and promote the ends of justice.

9 This affidavit is made in support of motion for leave to file said proposed amended and supplemental answers and counterclaims.

C. C. CAVANAH.

Subscribed and sworn to before me this 10th day of February, 1912.

[SEAL.] JOHN J. BLAKE,
Notary Public.

Endorsements: Title Court and Cause. Affidavit. Filed Feb. 10th, 1912. A. L. Richardson, Clerk.

And said defendant also lodged in said clerk's office on the 10th day of February, 1912, and tendered for filing an amendment to its answer by way of counterclaim, which said amendment appears in the records and files of the clerk's office in this cause entitled "Defendant's Amendment to Answer by way of Counterclaim," and also the following supplemental answer and counterclaim:

In the District Court of the United States for the District of Idaho, Southern Division.

At Law. No. 313.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Supplemental Answer & Counterclaim.

Comes now, the defendant, Boise City, a municipal corporation, and by leave of Court first had and obtained, upon motion made by the said defendant in that behalf, makes and files this, its supple-

mental answer and counterclaim to the complaint of the
10 plaintiff, setting forth the matters and things transpiring since the filing of the original answer herein, and by way of said counterclaim, alleges:

I.

The defendant, Boise City, alleges and reiterates, and by reference makes a part of this, its supplemental answer and counterclaim, each and all of the allegations of paragraphs one to thirteen inclusive, of the counterclaim set forth in defendant's amended answer and counterclaim, on pages eight to thirteen inclusive, of said amended answer and counterclaim.

II.

That since and subsequent to the first of November, 1909, and beginning on the 1st day of December, 1909, the Ordinance set forth in paragraph 6 of defendant's said counterclaim has continued in full force and effect, and is now in full force and effect, and there has become due from plaintiff to defendant on the 1st day of each and every month from December 1, 1909 to February 1, 1912, the sum of $300.00, aggregating in all the sum of $8100.00 and no part of said sum has been paid to the defendant by the plaintiff, or by any one upon its behalf, and there is now due and owing to the defendant from the plaintiff, under said Ordinance the sum of $8100.00, with interest at the rate of seven per cent per annum upon each maturing installment of $300.00 of said sum from the first day of the various months upon which said installments became due, until the present day.

III.

That on December 5th, 1911, the Clerk of Boise City notified the plaintiff that the said license fee of $300.00 was and remained unpaid for each month from the month of June 1906, up to and including the 30th day of November, 1911, with interest upon said sums, as aforesaid, and the said Clerk has on and after the first days of January and February, 1912, notified the said plaintiff
11 that the said monthly license fees for December, January and February, 1911, respectively, were and had become due and unpaid. Notwithstanding said notices, plaintiff has not paid said sums nor any part thereof.

Wherefore, the defendant prays judgment against the plaintiff on this, its supplemental counterclaim, for the sum of $8100.00 with interest on the several installments, hereinbefore mentioned, at the rate of 7 per cent per annum from the time the same became due until paid; and for costs and disbursements herein.

CAVANAH, BLAKE & MacLANE,
Attorneys for the Defendant, Residence, Boise, Idaho.
P. E. CAVANEY, *City Att'y.*

12 STATE OF IDAHO,
County of Ada, ss:

Harry Fritchman, being first duly sworn for and on behalf of Boise City, the above named defendant, deposes and says; that he has read the supplemental answer and counterclaim, and that he believes the facts therein stated to be true. That the above named defendant, Boise City, is a municipal corporation, organized and existing under and by virtue of the laws of the State of Idaho, and that affiant is the duly elected, qualified and acting Mayor of said defendant, and therefore, as such Mayor, makes this verification for and on behalf of said defendant.

HARRY FRITCHMAN.

Subscribed and sworn to before me this 10th day of February, 1912.

[SEAL.] JOHN J. BLAKE,
Notary Public.

Endorsements: "Title Court and Cause. Supplemental Answer and Counterclaim. Lodged in the Clerk's office Feb. 10th, 1912. A. L. Richardson, Clerk."

13 That upon the same day, to wit, February 10th, 1912, the said defendant served upon the plaintiff, by and through its attorneys, copies of all papers, hereinbefore mentioned and set out, and also served upon said plaintiff, by and through its attorneys, the following Notice of Motion:

In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Notice of Motion.

To the Boise Artesian Hot & Cold Water Company and to Messrs. Johnson & Johnson, Boise, Idaho, Its Attorneys:

You and each of you will please take notice, that the defendant, Boise City, will, at 2 o'clock, of Tuesday February the 13th 1912 at the Chambers of the Honorable F. S. Dietrich, United States District Judge of the District of Idaho, in the Postoffice and Federal Building at Boise, Idaho, move, before the said Judge, for leave to file an amended answer and counterclaim, and supplemental answer and counterclaim, in the above entitled cause.

Copies of said Motion, affidavit in support thereof and of the proposed amended answer and counterclaim and supplemental answer and counterclaim, are herewith served upon you, and the said mo-

tion will be based upon the pleadings now on file in said cause, and upon the said proposed amended and supplemental answers
14 and counterclaims, which have been this day lodged with the Clerk of said Court.

A copy of the order shortening the period of service of this notice and setting said matter for hearing is herewith served upon you.

Dated Feb. 10th, 1912.

CAVANAH, BLAKE & MACLANE,
Attorneys for Defendant.

Endorsements: Title Court and Cause. Notice of Motion. Filed Feb. 10th, 1912. A. L. Richardson, Clerk.

That thereafter, upon said papers hereinbefore mentioned, the said motion came regularly on for hearing before the Judge of said Court on the 13th day of February 1912, at 2 o'clock P. M. of said day, the defendant being represented upon said motion by its attorneys, Cavanah, Blake & MacLane, who argued in support thereof, and plaintiff being represented upon said hearing by its attorneys, Johnson & Johnson, who argued contra. Upon the conclusion of the arguments, the motion was by the Court taken under advisement and thereafter, to wit, on the 14th day of February, 1912, the said Court made and filed in said cause, its decision in writing, in words and figures, following, to wit:

15 In the District Court of the United States for the District of Idaho, Southern Division.

BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Memorandum Decision on Application for Leave to File Amended and Supplemental Answer.

February 14, 1912.

Johnson & Johnson, Attorneys for Plaintiff.
Cavanah, Blake & MacLane, Attorneys for Defendant.

DIETRICH, *District Judge:*

It is not thought necessary to make a statement of facts, and the views intimated at the time of the oral argument as to the impropriety of granting the application so far as it relates to supplemental matter are adhered to. In addition to what was said orally, it may be suggested that it is not impossible that the plaintiff has a claim against the defendant of the same nature as that sued upon, covering the period covered by the proposed supplemental counterclaim. If, as was suggested in the oral argument, the cross-demands of the

ontending parties, the demand of one for the amount due for water
ervice, and the demand of the other for the license fee, should be
deemed to compensate each other, there is all the more reason
6 why the defendant should not be permitted to plead the pro-
posed supplemental matter. It would be better to leave the
wo cross demands, accruing after suit was commenced, to compen-
ate each other. The legislature has expressly limited the pleading
f counter claims to such demands as existed at the time of the com-
nencement of the action, and I see no reason why an exception
hould be made to what appears to be the universal statutory rule.
n McGuire v. Lamb, 2 Idaho, 378, the statute was strictly enforced,
nd it was held that the pleading of a counter claim was defective
ecause it was not alleged that the demand pleaded was due at the
me of the commencement of the action, although it did appear,
nferentially at least, that the demand existed at the time the suit
as commenced.

Upon the other hand, I have concluded that a counter claim may
roperly be interposed for license fees due at the time this action was
ommenced. A distinction is to be drawn between an ordinary tax
nd a license like that involved in the counter claim. The tax is an
bligation imposed upon the property owner by law, which he can-
ot escape, and to which his assent is unnecessary. In this case the
efendant in substance said to the plaintiff, "You may continue
o occupy the streets of Boise City, if you desire so to do, upon the
ayment of a monthly compensation of $300.00." If, in view of
he conditions so imposed, the Water Company continued to occupy
he streets, a promise was implied upon its part to pay the specified
mount. It is therefore thought that the obligation to pay the
cense fee is one arising out of contract. While in some jurisdic-
ons it is held that the assessment of ordinary taxes creates a liabil-
y upon which debt or assumpsit upon a promise implied by law
ay be maintained, apparently a different view is held by the Su-
reme Court of the United States, (Lane County v. Oregon, 7 Wall.
71), and that the obligation is not contractual is clearly held
7 in some of the cases cited upon behalf of the plaintiff,
notably that of Pierce v. City of Boston, 3 Metc. 520, and
ohnson v. Howard, 41 Vt. 422. Upon the other hand the ruling
y the Supreme Court of the United States in City of St. Louis v.
Western Union Telegraph Co. 148 U. S. 92, to the effect that "An
rdinance compelling the Telegraph Company to pay $5.00 per an-
um for every pole within the city, for the privilege of using the
reets, alleys and public places, is a charge in the nature of a rental,
nd is not a privilege or license tax," logically supports the view
hat the obligation of the plaintiff here to pay $300.00 a month for
he privilege of using the streets and alleys, etc. is to be regarded as
ontractual.

In harmony with the conclusions reached, an order will be entered
enying the application to file a supplemental counter claim, but
ranting leave to amend by interposing a counter claim for the
mount due the defendant city at the time the action was com-
nenced. In order to avoid one objection raised by the plaintiff to

the proposed amended Answer, it is directed that the counter claim be pleaded as an amendment to the answer, thus avoiding the necessity of interposing demurrers and motions to reach the questions already disposed of. In other words, the defendant may, by amendment to the answer, interpose its counter claim.

18 Which said order was duly entered in accordance with said Memorandum decision by the Clerk in his Journal.

That whereupon, the defendant, by its attorneys, duly excepted to said decision, and prayed for five days in which to prepare, serve and present for settlement its bill of exceptions upon the same, which prayer, defendant, by its counsel consenting, was by the court allowed.

And whereas, the foregoing matters and things do not appear of record in said cause, but are proper to be made of record; Comes now, the said defendant by its counsel, within five days, aforesaid, and presents, serves and offers for settlement, this, its proposed Bill of Exceptions, and prays that the same may be settled and allowed as such, and may be made a part of the records in said cause.

Dated February 16th, 1912.

CAVANAH, BLAKE & MacLANE,
Attorneys for the Defendant.

We hereby admit due and timely service of the foregoing proposed Bill of exceptions and stipulate and agree that the same is full, true and correct, and that it may be settled and allowed by the Court as and for its bill of exceptions, waiving on our part all notice as to time and place of said settlement.

JOHNSON & JOHNSON,
Attorneys for the Plaintiff.

19 The above and foregoing Bill of Exceptions, being tendered to me for settlement, pursuant to stipulation of counsel, the same is hereby settled, allowed and certified as the true and correct bill of exceptions of the matters therein contained, and the same may be filed in this court as such.

Dated February 17th, 1912.

FRANK S. DIETRICH,
District Judge.

Endosed: Filed February 17th, 1912. A. L. Richardson, Clerk.

0 *Defendant's Bill of Exceptions.*

n the District Court of the United States for the District of Idaho, Southern Division.

BOISE ARTESIAN HOT & COLD WATER COMPANY, Plaintiff,
v.
BOISE CITY, a Municipal Corporation, Defendant.

Action at Law.

Be it remembered: That this cause came on to be heard on Feb-uary 21, 1912, in the above entitled Court, at Boise City, Idaho, efore Honorable Frank S. Dietrich, Judge of said Court; Messrs. ohnson & Johnson and L. F. Clinton, Esq., appearing as counsel or plaintiff, and P. E. Cavaney, Esq. City Attorney, and Messrs. avanah, Blake & MacLane, appearing as counsel for defendant. A ury of twelve*r* persons was impaneled and sworn to well and truly ry the issues; whereupon it was stipulated by and between counsel nd ordered by the Court that either party should have sixty days rom and after the date of judgment in which to prepare, serve and odge for settlement any proposed Bill of Exceptions to the rulings pon the trial;

After which the following proceedings were had, to wit:

The plaintiff after a statement of the issues on its part called B. S. OWE, who was duly sworn as a witness on behalf of the plaintiff nd testified as follows:

Direct examination by Mr. JOHNSON:

Q. State your name, place of residence and occupation, Mr. Howe?

1 Whereupon the following proceedings were had, to wit:

Mr. MACLANE (Counsel for the defendant): If the Court lease, before answering that question, we make the following ob-ection: The defendant objects to the introduction of any evidence n the complaint in this cause, for the reason that said complaint ails to state a cause of action in the following particulars, to wit:

1. That the complaint shows on its face that ordinance granted o the predecessors in interest and title of the plaintiff, and under hich the plaintiff is maintaining its water system in the streets of he defendant city, were passed and accepted by the plaintiff's prede-essor in interest, and assigned to the plaintiff, at a time when the evised Statutes of Idaho, 1887, Section 2711, was in force, and by aid section the plaintiff company and all water companies were equired to furnish water free for fire purposes, and that said section as impliedly a term and condition of the grant and privilege given o the plaintiff company and its predecessor in interest, and consti-uted a contract between the plaintiff company and the defendant ity obligating the plaintiff company to furnish free water for fire

purposes; that the obligation of said contract is violated by the amendatory act of March 9, 1905, in so far as said amendatory act requires the defendant, Boise City, to pay any rates for fire purposes, and said amendatory act is thus far and to that effect repugnant to the constitution of the United States, Article 1, Section 10, which declares no state shall pass any law impairing the obligation of contracts.

2. That the complaint shows on its face that the alleged cause of action therein set forth is based upon a general law of the State of Idaho, which said general law is not applicable to Boise City, which is organized under a special charter, of which this court takes judicial notice.

22 3. That the complaint alleges no ordinance or contract under which the plaintiff company ever has been, or is now, authorized to furnish water to the defendant city as required by the Idaho Revised Codes, Sec. 2838, (Boise City v. B. A. H. & C. W. Co., 4 Idaho, 351).

4. The complaint fails to allege that any claim for the amount sued upon in this action was ever presented to the auditing committee of Boise, as required by Section 59 of the City Charter of 1907.

If the Court please, with respect to those first two grounds, we don't care to argue them. They have been passed upon, and the first one is merely stated for the purpose of saving the record in the event of a possible reversal by the Supreme Court of the United States of the present judgment in the case pending there upon writ of error. The third and fourth we shall particularly rely upon at this time, or if the Court prefers, as perhaps would be better, on motion at the close of the plaintiff's case.

Which objection was by the Court overruled, to which ruling of the court, counsel for defendant then and there duly excepted and which exception was by the Court allowed, and which ruling of the Court the defendant now assigns as error, the same constituting and being,

Defendant's Exception No. 1.

Thereupon the proceedings continued as follows:

Mr. Johnson, on behalf of the plaintiff, read into evidence and filed with the Court a stipulation of facts, duly signed by counsel for the respective parties, which stipulation of facts is the same stipulation embraced within plaintiff's bill of exceptions

23 heretofore settled and allowed, and which is by this reference made a part of this, the defendant's bill of exceptions.

Mr. B. S. Howe thereupon continued his testimony on behalf of the plaintiff, as follows:

I am Secretary of the Boise Artesian Hot & Cold Water Company and have occupied that position for the past 18 years. On August 1, 1905, that company had about 40 miles of mains, a pumping station with two Worthington steam pumps situated on the Natitorium grounds within the city limits of Boise Idaho, and three reservoirs, one on the hot water ground near the Penitentiary with a capacity of 500,000 gallons, another one at Hull's Gulch, for domestic service,

with a capacity of 220,000 gallons, and a further one at Hull's Gulch higher up with a capacity of 550,000 gallons, which last is the reservoir referred to in the report of the water commission (contained in plaintiff's bill of exceptions). The report of the commission went into effect August 1st 1905, on our local rates, but for fire service commenced on the last day of May 1905, and the City paid the rates fixed for one year until the first day of May 1906. The Company's plant was substantially the same in May 1906 as heretofore testified to, and during that period the fire apparatus of the City consisted of a steamer having a 600 gallon per minute capacity, and one or two chemicals and ladders. The City has always used water from the mains of the plaintiff company for fire purposes prior to and since the commission made its report, and after the report of the commission the water company charged the rates for domestic and fire use specified therein, the city paying such rate for water for fire purposes for the first year to the amount of $3,000.00, up to May 1, 1906.

(By Mr. JOHNSON, counsel for the plaintiff:)

Q. After the report of the commission went into effect,
24 Mr. Howe, state whether or not the upper reservoir in Hull's Gulch which you have referred to, at an elevation of approximately 169 feet above Main Street, was kept constantly filled with water.

Mr. MACLANE: If the Court please, we object to that on the ground that it states a conclusion of the witness, and on the further ground that it doesn't appear that the witness knows, of his own knowledge whether it was kept full of water or not, and on the further ground that it is leading and suggestive.

The COURT: The question is leading; otherwise I think it is unobjectionable. I think I will overrule the objection.

To which ruling of the Court the defendant then and there excepted and which exceptions was by the Court allowed and which ruling the defendant now assigns as error constituting and being, Defendant's Exception No. 2.

(By witness, Mr. HOWE:)

A. Yes sir, it was kept full all the time.

Mr. JOHNSON:

Q. Was it kept full during all the times between the 1st of June, 1906 and the 1st day of August 1909?

To which question the defendant made the same objection as hereinbefore noted in Exception No. 2, and the Court made the same ruling, which said ruling was by the defendant duly excepted to, and which said exception was by the Court allowed, and which ruling the defendant now assigns as error, constituting and being, Defendant's Exception No. 3.

(The WITNESS:)

A. Yes sir.

With respect to the steam pressure in the boilers and pumps at the pumping station, our instructions were to maintain a
25 pressure sufficient to start up the pumps, both of them, in case of fire, and when I have been there, which has been very frequently it has never been below 90 pounds. Until November 1, 1906, I was there five or six times a week during the evening. Between May 1, 1906, *the* August 1, 1909, I went to the Natatorium every evening and nearly always down to the pump station which was only three or four hundred feet away and I would say I visited the pump station as often as five times a week. There was always a fire maintained when I was there and we built a telephone line from Hull's Gulch to the office and from the office to the fire station, and kept it to give fire calls. In the summer of 1908, bells were established and both at Hull's Gulch and the Pumping Station have been connected with the fire alarm system of the City, and whenever an alarm sounds in Boise it sounds with the same number at both those places, just the same as at the Central Station. The Water Company has kept the gongs going by winding them up. We kept some one all the time on duty at the pump station making three shifts. We hired one extra man, engineer, because we had to have someone there all the time to answer fire calls by reason of this report. At Hull's Gulch reservoir we had a family that changed the gates while there was a fire alarm and was never out of hearing of the telephone until the gong was installed. We had this family there all times between May 1, 1906 and August 1, 1909. At time of fire the pressure was augmented at the pumping station by adding fire under the boiler and turning on both pumps and at Hull's Gulch the family there closed the gates of the lower reservoir and opened the gates of the upper to balance the pressure. After we shut off the lower reservoir and pumped against the higher reservoir that gave us the highest pressure we could get and made the pressure in town. When the pumps are turned on at the pumping station all water not taken in the town goes into the lower reservoir. We close off the lower reservoir then only the upper reservoir is on, and the pressure gained from the upper reservoir and from the pumps
26 makes the pressure equal all over the town and higher than the lower reservoir would be. We can't get a pressure higher than the outlet of the pipes into the reservoir. I do not think the chief of the fire department ever ordered the gates at Hull's Gulch Reservoir closed. I cannot state positively of my own knowledge whether the *presons* in charge of these different stations kept within hearing distance of the alarm, but there was never to my knowledge any failure on their part to perform the duties required of them. Whenever there was a fire alarm in town we telephoned the fact to both the reservoir and pump station.

The capacity of upper Hull's Reservoir is 550,000 gallons and the Water Company has kept it full from the first day of May 1906 to the first day of August 1909. The Water Company has always kept its plant in readiness for fire during that time. Since the bells were put in we get the alarm as soon as it is gotten in town. The Boise City Fire Department has used the water during this time for fire purposes, drills and tests.

The Company installed electric pumps about June 1, 1907, four Worthington electric centrifugal pumps, electrically driven, two of them being 6 inch pumps with a capacity of 1000 gallons each and 100 foot head, and one of them an 8 inch pump with a capacity of 1850 gallons per minute against a 200 foot head; the latter being used for fire purposes. We installed that eight inch pump for use in fire service.

(By Mr. JOHNSON:)

Q. How does that compare in efficiency with the capacity of the steam pump you had used prior to that time.

Mr. MACLANE: If the Court please, we object to that question on the ground that it is irrelevant and immaterial and for the further reason that the test of efficiency is prescribed by the report of the commission, and the company had no right to substitute any other efficiency test.

27 Which objection was by the Court overruled, to which ruling of the Court the defendant then and there duly excepted, which exception was by the Court allowed, and which ruling the defendant now assigns as error the same constituting and being, Defendant's Exception No. 4.

(The WITNESS:)

A. It was about equal to both the steam pumps, I think a little more.

Q. Do you know how many gallons per hour as against a 200 foot head the electric pump would supply?

To which question the defendant objected for the same reasons as in the preceding exception, which objection was by the Court overruled, to which ruling of the Court the defendant then and there duly excepted, which exception was by the Court allowed and which ruling the defendant now assigns as error, constituting and being, Defendant's Exception No. 5.

(The WITNESS:)

A. I think about 110,000 gallons an hour, being 1850 gallons a minute multiplied by 60.

Q. How would the steam pump pump an hour or in a minute?

To which question and following questions of the same import the defendant duly excepted and which exceptions were by the Court allowed and which ruling the defendant now assigns as error, constituting and being, Defendant's Exception No. 6.

Whereupon the witness answered said question and like questions, over the same objection and ruling and exception, substantially as follows:

28 A. The steam pumps would pump 18 gallons to the stroke and if run fast would pump more; against the fire pressure it would run 40 to 45 strokes a minute which would bring each pump to an efficiency of 720 gallons, making 1440 gallons per

minute for both pumps, or a little over 86,000 gallons an hour as compared with 110,000 in the electrical pumps. The pressure, however, would be the same as the head of water pumped against the same reservoir, being limited by the opening at the *the* upper end into the reservoir as the entire system led into that reservoir. The opening of the upper end of the line into the reservoir is the limit. If the reservoir were twenty feet higher, with our pumps we could get twenty feet more pressure; if it was twenty feet lower it would be twenty feet less. When the pumps are started to afford the fire pressure, instead of pumping up against the 100 feet reservoir it is pumped up against the 169 foot reservoir and the water then flows into that reservoir if it is not taken in the town. All surplus water not being distributed into the town flows into the reservoir.

The city availed itself of this fire pressure during this period, between May 1, 1906 and Aug. 1, 1909. When an alarm of fire was turned in the steamer was attached to the hydrants of the water company's system, or sometimes they used direct pressure putting the hose on the hydrant. This was done at all fires between May 1906 and August 1909 where they needed to use water. I went to about every fire. There were very few cases where they used the ditch and did not use any water from us at all as they did not need our water when they took direct from the ditch. This was not because of any failure of the water pressure, but sometimes they used the ditch for the engine, and the fire plugs attached to our system for the hose.

The City between those dates ordered additional hydrants installed and connected to plaintiff's mains. In March and April 1908, we attached 11 hydrants on a new main on Main street provided with the steamer attachment so that the steamer could be attached to
29 them. These went into service for fire purposes May 1908. There were two kinds of hydrants but some hydrants are made with smaller nozzles to put the hose on, just two and one half inch hose, then others are made so that besides these attachments for hose there is a steamer attachment a big five or six inch place to put the suction for steam on and they ordered those, and we got them for them, and they paid for them and we put them on. There were 90 hydrants in use by the City May 1, 1906, and 11 additional were installed up to August 1909. The amount due for hydrant rentals on August 1, 1909 was $10,096.00, exclusive of interest; neither the principal nor interest has been paid since that time.

(Mr. JOHNSON:)

Q. Did you at any time make demand for amounts due, and if so state just what you did?

The COURT: Why go into that? The demand is admitted is it not?

Mr. JOHNSON: I wanted to show, if your Honor please, that it was presented to the auditor and sworn to, and that we went through this due course.

Mr. MACLANE: I think to preserve the record we will object on the

ground that it is not pleaded. Also, if the court please, it is not the best evidence. The statement itself should be produced.

The COURT: I assume this is preliminary. You may answer the question.

To which ruling the defendant then and there duly excepted, which exception was by the Court allowed and which ruling the defendant now assigns as error constituting and being,

Defendant's Exception No. 7.

A. We took our bills to the City Clerk and swore to them; She is Secretary of the Auditing Committee, and we swore to every one. The Clerk makes out the list and takes them into the Auditing Board and that was the course we pursued with reference to those bills and demands for their payment.

30 Mr. JOHNSON: That is all.

Cross-examination by Mr. MACLANE:

Mr. HOWE: The system has 150,000,000 gallons a year of gravity water from the artesian wells and the rest is pumped into the water mains and what isn't taken by them into the City goes into the reservoir which constitutes a sort of emergency outlet or acts like a standpipe.

I measured the capacity of upper Hull's Gulch reservoir some years ago and haven't got the figures here. I don't remember myself that the capacity was 550,000 gallons but it has always been called that. I don't remember what my measurement was, I can't swear that it has a capacity of 550,000 gallons, but I believe it does.

I was at the reservoir very few times between the first of May 1906, and the first of August 1909, but sent men there frequently who reported to me that the reservoir was full. I base my statement that the reservoir was kept full of water largely on what these men reported to me as we sent them there for that purpose and they reported it as they found it. We have sent different men there. Samuel S. Drake and a man by the name of Lewis, and I have been there myself. I have sent a good many men there. Aside from their statement I do not know whether the reservoir was kept constantly full or not. I can't tell from my own knowledge. I am at the office most of the business hours of each day. It was my custom to go to the Natatorium. I used to be out there every night. There was a steam gauge or indicator of the pressure upon the boiler maintained there at that time and frequently I read that gauge. I probably read it every night when I went up there. I never went around the steam boiler without reading it, and it is from those readings that I make the statement as to the amount of the pressure which I found to be usually in the neighborhood of 90 pounds. I visited the boiler on my various trips up there, that is where
31 the gauge is on the boiler, and I noticed that there was fire under those boilers every time. J. E. Moore was in charge there during all of that period and he is still there. We have a gauge that indicates the pressure of the pipes now and I think we had then. We have a gauge that indicates the pressure of the

pipes at the pump station and we have one in our office. The one in the pump station would indicate the pressure on the pipes at that point and the one in our office would indicate the pressure down town at that point. The pressure is very much greater at the pumps than it is down town at the office as there is considerable loss by friction of the water in the pipes.

The electrical apparatus was installed to supplant the steam pumps about June 1907; the steam pumps have been operated since that time but not constantly, however, simply as emergency pumps when the electrical apparatus was being repaired or when we needed both. The pumping station was enlarged and we have used both. From June 1907 to August 1909 we used the electrical apparatus most entirely. There is no indication of steam pressure in that apparatus, and while there are gauges to show the water pressure there is not any steam connected with it.

Upper Hull's Gulch Reservoir is about 2400 or 2500 feet above the lower one on the opposite side of Hull's Gulch. The lower reservoir is on the east side and the higher reservoir is on the west side and about 4500 feet above Lemp Street which is the last street in the city here. It is about 4500 feet north of the north boundary of the town. After May 1, 1906 for about ten or eleven months we kept a man named Lewis employed there to open the gates. Since that there has been a family by the name of Fuller and they are still with us. Mrs. Fuller is there all the time. She does most of the tending to the gates and Mr. Fuller does when he is there. We have hydraulic gates; they open them right in their own house. All she has to do is to turn off one and turn the other on and
32 the fire pressure is on. We have three hydraulic gates there and one at the pump station. The three up there close off the two water pipes that lead from that reservoir down town and the other one opens the pipe line that comes from the upper reservoir and supplies the high pressure. Until they got the regular city fire alarm bells it was our duty here at the office to communicate to them the fact of a fire by telephone and we had one of our clerks always come there nights to do it when I was not there. Either he or I did it always. In the day time there were several in the office and we always rung them up the minute a fire alarm was sounded. I think I know positively that they always responded to the phone. I stated at other times that the pressure was always run up at the pump station and the gates at Hull's Gulch were always opened. I never was at the pump station but once when an alarm was turned in but I know that the pressure was always run up because I could see it on our gauge. The gauge in our office would show in a second. Just the moment the pressure went up, up goes the gauge. I could read it from the gauge in my office. It never fails, I know that the gates were always opened at the reservoir because we could not get the pressure at the office without it. It was a physical impossibility to get it.

The Company did not extend the fire alarm system to the Natatorium and Hull's Gulch; the city did it; we can't do anything with the fire alarm system; a few feet of said system is outside of the

city limits. Hull's Gulch Reservoir is some distance from the city; we had poles and the wire, and the city put the bell in up there; the fire alarm belongs to the city and they handle it entirely; they do not allow any one to touch it. I don't know whether our company ever paid for the system outside of the city limits; if the city ever presented a bill it was paid. We took all the care of the system outside the limits that there is taken care of. The fire chief watches all those things. We have people there and he tells them what to do and they do it. It was in 1908 that the fire alarm sys-
33 tem was extended to the Natatorium. Prior to that time we relied on the telephone for communication.

Upper Hull's Gulch Reservoir was the only one which was susceptible of use in time of fire, the other two were for domestic purposes and were not relied upon in computing the storage requirements for fire purposes which had to be met in Hull's Gulch Reservoir alone. The pressure in the pipes would be practically the same, as long as there was any water in that reservoir. If the water was down to a foot in depth it would be only 5 or 6 feet lower than at full height and the pressure therefore would be practically the same. In time of fire our pumps threw or carried the water into Hull's Gulch Reservoir to keep that up, and that supplied the pressure in the pipes. It balances the pressure. We have had fires here and when I would go up there the reservoir would not be lowered at all, showing that no water came out of it. It merely holds it there and all the water that was used for fire would be pumped. We have done that frequently and we have never seen it lowered more than a foot or so. The largest fire we ever had it wasn't lowered only about one foot and a half.

Mr. MACLANE: That is all.

Redirect examination by Mr. JOHNSON:

Mr. HOWE: Upper Hull's Gulch Reservoir was built by one of the predecessors of the Boise Artesian Hot & Cold Water Company; it it in the neighborhood of 200 feet long. I measured it one time and used the measurement in calculating in gallons what it would hold, but can't remember the computation; that water was kept in that reservoir for fire purposes. I didn't go there every day, but when I did go there the reservoir was full and I know as a fact the water was only used from it for one purpose and whenever I visited it the next time the reservoir would be full. It was full every time I visited it. The surplus water runs down into the lower reservoir.

34 Recross-examination by Mr. MACLANE:

Mr. HOWE: I have been at upper Hull's Gulch Reservoir hundreds of times. Three years ago we were sinking an artesian well there and I was there every day for three or four months. I frequently noticed the stage of water there during that time. Prior to that time I was there a number of times. I can't tell how many.

Mr. MACLANE: That is all.

By the COURT: I want to ask Mr. Howe a few questions. I think

perhaps I understand the system but possibly the jurors do not all understand it.

Mr. HOWE: In case of a fire alarm the water would all go directly into the pipes if the city used the total amount being pumped, but any surplus over such use would get into the reservoir; the pressure would be substantially the same in such case as the gravity pressure shown by the height of the reservoir. It would be a little better than that because it comes both ways and divides the friction. That is what I mean by pumping against the reservoir. We have a valve at the lower reservoir which is regulated by pressure and when the upper reservoir is full it opens just enough to take the water into the lower reservoir so that it won't run over up there. It frequently does run over. The fire hydrants belong to the city; they own all the hydrants and pay us for attaching them; if they want a new one attached they pay us for attaching it. The city kept the hydrants that we refer to in our complaint in repair and usable condition during the period covered by this suit.

Witness excused.

J. E. MOORE, being called and sworn on behalf of the plaintiff testified as follows:

Direct examination by Mr. JOHNSON:

I have been in the employ of the plaintiff water company since 1893, as engineer in charge of the pump house and was serving in that capacity between May 1, 1906 and August 1, 1909; from 1906 to 1907, the Company used the steam plant and had two Worthington compound pumps 10x16 and 12x10 and two 80 horse power boilers 16 feet long and 62 inches in diameter; one of these boilers was supplied with the pressure gauge continuously, all the time. One boiler developed 80 horse power and the pumps about 40 apiece. Both pumps could be handled with one boiler. I had two men under me and one was continually at the pump house day and night during the whole period from May 1, 1906 to August 1, 1909. Fire was kept continually under the boilers at that time and there was not less than 100 pounds of pressure maintained in the boilers.

Up to 1908 there was a telephone communication between the fire station, the Water Company's office and the pumping station and in 1908 the fire alarm consisting of a gong at the pump house and a gong at the reservoir connected with fire boxes in the city was maintained in addition to the telephone communication. When an alarm of fire was turned in the gongs sounded at the pump house and reservoir. The City maintained the wires, I believe, and the Water Company attended to the gongs on its premises by winding them up again after striking.

I have visited Hull's Gulch Reservoir. I built the hydraulic gates there. These gates were operated from the kitchen of the house of the attendant by merely turning a valve. In case of fire the woman at the house upon getting the alarm would shut off the lower gate to keep the water from going into the lower reservoir and open the

upper valve into the high pressure reservoir. When we got an alarm we would start the extra pumps at the steam plant which would take from a minute and a half to two minutes. We carried from 75 to 90 pounds of pressure according to the amount of water the pipes were drawing in town. During sprinkling hours the pressure would drop to 70 pounds which was the normal fire pressure; for domestic purposes it was about 45 pounds.

36 We started the pumps immediately upon the alarm of fire and ran the steam up to 120 pounds, which was the limit of the boilers' capacity as it would blow off at the safety valve at that point. It would take from four to five minutes, but not to exceed that to get the pumps into full speed. This was done at every fire from May 1, 1906, to August 1, 1909, as soon as we got the alarm. I don't know any case in which we did not get the alarm.

We had an altitude gauge to show the elevation of the reservoir and the head of water against which we were pumping, and from that I could tell that the gates were open at Hull's Gulch. There was always some one hearing of the gong; the man never went to exceed 100 feet from the pump house.

We had an extra large telephone extension bell; had one in the fire room; one in the pump room and one in the machine room and I could always hear them. We always kept the plant in the best of shape for fire purposes; we kept up the steam plant always and everything in good shape for fire purposes.

We started the electric plant in 1907 which for fire purposes consisted of one 8 inch fire pump at that time having a capacity of 110,000 gallons an hour against a 200 foot head.

Q. How did that compare with the capacity of the steam plant?

To which question the defendant by its counsel objected on the ground that the same was irrelevant and immaterial and for the further reason that the test of efficiency is prescribed by the report of the commission and the Court has no right to prescribe any other efficiency test; which objection was by the court overruled, to which ruling the defendant then and there duly excepted, which exception was by the court allowed and which ruling the defendant assigns as error constituting and being,

Defendant's Exception No. 8.

37 A. The steam plant was about 91,000 gallons an hour. It did not take as long to bring the electric pump into operation after an alarm as it did the steam pump. It only took about a half of minute.

Mr. JOHNSON: That is all.

Cross-examination by Mr. MACLANE:

The city installed the fire alarm in 1908; the water company had nothing to do with it as far as I know; prior to that time no fire alarm system had been extended to the pump house. The electric pumps were started about June or between June and August 1907.

Witness excused.

M. L. TWOGOOD, being called as a witness on behalf of the plaintiff testified as follows:

Direct examination by Mr. JOHNSON:

I was chief of the fire department of Boise City from a time prior to May 1, 1906 until April 1909. The fire department kept an official record of fires in a large book. In this book is recorded all fires, the time the alarm came in, whether from a box or telephone, and gave a general description of the fire; all of these records were made by me during my administration as chief of the fire department, except while I was on my vacation or something like that, when the assistant chief would enter up something. I can state of my own knowledge that the fire department of Boise City used the water from the mains of the plaintiff in this case practically all of the time at the fires after May 1, 1906, and up until my term expired as chief of the fire department. That record shows whether or not the steamer was used at a fire. On May 19, 1906 was the
38 only fire in the month of May of that year in which the steamer was used. I recall that particular fire and there was all the water obtained for the use of the engine at that fire from the Water Company's mains that we could use. We had plenty of water and the service was good. In case of a fire or if an alarm would come into the station the chemical had the preference, that is, went out of the house first, then came the steamer, then the hose wagon and the orders were for the steamer to go to the nearest hydrant to the fire and attach to this hydrant. As soon as the steamer got to the hydrant they were supposed to connect up and we laid our hose and used the steamer pressure. The steamer was so constructed that we would use the pressure from the mains direct. The water could run out through the steamer without connecting up the pressure at all, and we could at our option use either the steamer pressure or just the pressure from the mains. During 1906 and a part of 1907 there was only one line of hydrants in Boise City and that was connected with the mains of the plaintiff company; the Cruzen system was afterwards installed but I don't know when. That system was in operation part of the time I was Chief and we used it some time, but not if we could help it. The Chief was permitted to use his own judgment with respect to the hydrants he would attach to. I have examined the official records of fires made during my incumbency in office as Chief and from that record I have refreshed my memory of every fire and recall the water supply and pressure was always good and adequate with the exception of one occasion when some barns burned down, when the wire which furnished the electricity to the pump was burnt off in the vicinity of the fire and we were short of water for 30 or 35 minutes, when the pressure was resumed by attachment to the so called Barber Plant; there was no other time when I was Chief of the Fire Department that I failed to get an adequate supply of water pressure from the mains of the plaintiff and we used the water practically at every fire.

39 I installed a fire alarm connecting the pumping station with the City system in June or July 1907. Prior to that time we had only telephone connections. I had endeavored to have the city officials make the installation prior to that time. It happened quite often, that is when a fire was going down and we did not need the high pressure, we would cut off the pumps and let the water run through the steamer without pumping. I have noticed the gauge at different times and we got 75, 80, 85 or 90 pounds pressure direct from the mains in that way, without the use of the steamer, and this was at all times of the year. There was practically the same pressure in summer as in winter and the domestic consumption made no difference that I could tell. There were 56 alarms in 1906; they were not all fires, some were false alarms and I should think that we used the steamer at an average of three fires a month.

Examination by the COURT:

We made reports to the city authorities every month; the city council would have official knowledge that we were getting the water from the plaintiff's mains, because I have seen members stand right beside the steamer when we were taking water from hydrants which they knew were attached to this system; our reports did not contain any data with reference to the source of water supply.

Witness excused.

H. W. FULTON, being called and sworn testified on behalf of the plaintiff as follows:

I have been Chief of the Fire Department of Boise City since April 16th, 1909, and between that date and August 1909 the water supply and pressure from the plaintiff's system was always good and we used water for their mains and hydrants during that time. There were no fires at which we did not receive sufficient water and pressure.

Witness excused.

40 GREEN B. HAMBY, C. C. CREED, JUNE BOYKIN, called and sworn testified on behalf of the plaintiff, as follows:

Direct examination by Mr. JOHNSON:

C. C. CREED testified that he was assistant chief of the Boise City Fire Department during the entire period between May 1, 1906 and August 1, 1909, and that it was part of his duty to inform himself as to the water pressure and the amount of water being used, and the service, and that the fire department also used the water from plaintiff's mains for fire drills during that period of time, and that they would hook the hose on to plugs about twice a month and turn the hydrants on and get the pressure from the hydrants and that they found the pressure in these instances very good.

JUNE BOYKIN testified that during all that period of time between May 1, 1906 and August 1, 1909 he was a member of the Fire Department of Boise City and acted as nozzleman and driver of the engine.

GREEN B. HAMBY, testified that he was a member of the Boise City Fire Department from September 19, 1907 until the latter part of April 1909 and was engineer in charge of the steamer.

All of these witnesses testified that during that period of time the fire department used water from the plaintiff's hydrants and system and during such period the service, supply and pressure were always adequate and good.

Witnesses excused.

H. C. HART, being called and sworn testified on behalf of the plaintiff as follows:

Direct examination by Mr. JOHNSON:

I was bookkeeper of the plaintiff Company between April
41 1, 1906 and August 1, 1909, and whenever a fire alarm was turned in I turned on the fire pressure and if a fire occurred at night I went to the office for that purpose; we had a private telephone system from the pump station to the reservoir. I have attended most of the fires and have never found a time except once at the Front Street Stable when the pressure was low; it was my place to see that the Fire Company had the pressure and on all occasions I would go to the chief of the fire department or to the engineer in charge of the engine to see if the pressure was good. At these various fire- I have always found the pressure all right. They would have between 60 and 70 pounds here in the city. I don't know what the corresponding pressure would be at the pump station but it would be a good deal more than that.

Witness excused.

JAMES A. PINNEY, being called and sworn on behalf of the plaintiff testified as follows:

Direct examination by Mr. JOHNSON:

I was Mayor of Boise City from July 1905 to March or April 1907; as Mayor of Boise City I became acquainted with the conditions with reference to the use of water for fire purposes about the city; and as such mayor I know that the city obtained water for fire purposes between May 1, 1906 up to the time I retired from office, from the plaintiff company, I had no reason to suppose that the city was receiving anything but satisfactory service from the water company, I never heard any complaints.

Cross-examination by Mr. MACLANE:

I am a stockholder in the water company to a very small extent and was a stockholder at the time I was mayor of Boise City.

Redirect examination by Mr. JOHNSON:

The fact that I was a stockholder would not influence me in any manner whatsoever.

42 Witness excused.

Plaintiff rests.

(Whereupon the jury retired from the court room.)

Mr. MACLANE: If the court please comes now the defendant, the plaintiff having rested and moves this court for an order of non-suit and judgment dismissing the complaint of the plaintiff herein, on the following grounds, to wit:

I.

That the evidence on behalf of the plaintiff shows that ordinances granted to the predecessor in interest and title of plaintiff and under which the plaintiff is maintaining its water system in the streets of the defendant city were passed and accepted by the plaintiff's predecessors in interest, and assigned to the plaintiff at a time when the Revised Statutes of Idaho, 1887, Section 2711, was in force, and by said section the plaintiff company and all water companies were required to furnish water free for fire purposes, and that said section was impliedly a term and condition of the grant and privilege given to the plaintiff company and its predecessors in interest, and constituted a contract between the plaintiff company and the defendant city obligating the plaintiff company to furnish free water for fire purposes; that the obligation of said contract is violated by the amendatory act of March 9, 1905, in so far as said amendatory act requires the defendant Boise City, to pay any rates for fire purposes, and said amendatory act is thus far and to that effect repugnant to the constitution of the United States, Article I, Section 10, which declares no state shall pass any law inpairing the obligation of contracts.

II.

That the evidence on behalf of the plaintiff shows that the alleged cause of action therein set forth is based upon a general law
43 of the State of Idaho which said general law is not applicable to Boise City, which is organized under a special charter of which this Court takes judicial notice.

III.

That the evidence on behalf of the plaintiff alleges no ordinance or contract under which the plaintiff company ever has been, or is now, authorized to furnish water to the defendant city as required by the Idaho Revised Codes, Section 2838.

IV.

That the evidence introduced on behalf of the plaintiff is insufficient to show an implied contract on the part of the city to pay for water furnished by the plaintiff to the defendant city in that the

evidence fails to show any knowledge upon the part of the council of Boise City that water was being used for said purposes during the time covered by the complaint herein; the evidence further fails to show any authority to the fire department of Boise City granted by the mayor or common council, to use said water for fire purposes, or for any purposes. And, third, the evidence fails to show that the person using such water for fire purposes had any authority whatsoever under the charter or under the facts to bind the city to pay for water so used.

V.

That the evidence fails to show that the plaintiff complied with the following terms and conditions of the alleged supplementary report attached to plaintiff's complaint, as an exhibit, and embraced in a stipulation of facts on file herein, to wit;

(*a*) That there is no competent evidence that the upper reservoir in Hull's Gulch has been continuously or at all filled with water during the time mentioned in the complaint.

44 (*b*) That the evidence fails to show that a steam pressure of 60 pounds or any steam pressure has been maintained in the boilers and pumps at the pumping station during the period mentioned in the complaint.

(*c*) That the evidence fails to show that the plaintiff company ever extended the fire alarm system to the Natatorium and Hull's Gulch reservoir as required by the said alleged supplemental report.

(*d*) There is no competent evidence to show that the plaintiff company kept 550,000 gallons or any number of gallons of water constantly or at all in storage for use in case of fire.

(*e*) The evidence affirmatively shows that the plaintiff company did not maintain the system or efficiency test required by the supplementary report heretofore referred to, but shows that said system was abandoned during the year 1907, and a substitute system not in confirmity with the directions or requirements of said supplementary report was installed.

(*f*) The evidence fails to show that any claim for the amount sued upon in this action was ever presented to the auditing committee of Boise City, as required by Section 59 of the Charter and there is no competent evidence that any such claim was ever presented to said auditing committee.

(After argument of said motion by counsel for plaintiff and defendant the following proceedings were had:)

The COURT: I think it is sufficient at the present time, gentlemen, to say in disposing of this motion, that the evidence here is sufficient to justify the jury in finding an implied contract to pay for water used at the rates fixed by this commission. I am aware that there are authorities holding (and they are numerous) that a municipal corporation or a public corporation cannot be

45 bound by an implied contract. Those decisions, of course, rest upon charter provisions either in the general law or in special charters, but without discussing at length the distinction which should be made I think it may properly be held that under

circumstances as disclosed here thus far, the jury would be warted in finding the city liable. Certainly they would be warranted finding that the city authorities here, the council and mayor, ew that the water company was furnishing this water upon the umption that it was to be paid for in accordance with that sched-. It is doubtful whether a jury would decline to believe that. It almost impossible to imagine that the city government, the re-nsible officers, the council and the mayor, have not at all times derstood that this water was being furnished upon that assump-n on the part of the company. New hydrants have been installed, d the old hydrants have been kept in repair, in such condition t they could be used. Here is a city of considerable size, with no ner fire protection, no other water supply, at least a large part of e time, and it would pass credulity to think that the city officers ve not fully understood all the time that the Water Company ex-cted compensation. For the reasons thus briefly stated, I shall ny the motion.

To which ruling of the court the defendant then and there duly cepted, which exception was, by the Court, allowed, and which ling the defendant now assigns as error, constituting and being,

Defendant's Exception No. 9.

Whereupon after an opening statement by Mr. MacLane as coun-l for the defendant, the following stipulation was offered in evi-nce on behalf of the defendant.

Mr. MACLANE: It is stipulated by and between counsel for the aintiff and defendant respectively that this book which defend-nt's counsel holds in his hands is the journal or minute book of the proceedings of the council of Boise City, and that the follow-ing appears in said minutes. In the proceedings of May 10, 1906: "Roll Call, on motion of Davis that the Clerk be in-ructed to notify the Boise Artesian Hot and Cold Water Company discontinue the extra pressure maintained for fire purposes, as the ity would pay no further bills for this service from this date, re-ulted as follows: Ayes, Annett, Davis, Johnston, Koelsch, Mc-ain, Mickel, Schriver, Sinsel, Yoemans; Noes, Davidson. Absent. Byron, Hubbard. A majority voting in the affirmative, the motion as declared carried." The minutes are approved: "James A. Pin-ey, Mayor. Attest. E. L. Savidge, City Clerk." That pursuant o such motion, the City Clerk notified the plaintiff company of such notion. Is that correct?

Mr. JOHNSON: Yes.

Mr. MACLANE: That in the minutes of May 17, 1906, the follow-ng minute appears in the records of the city council: "The com-munication from the Artesian Hot & Cold Water Company was read, tating that they should continue to furnish the additional pressure of water for fire purposes. On motion, this communication was re-ferred to the city attorney. Minutes approved, James A. Pinney, Mayor. Attest. E. L. Savidge, City Clerk." That no further action has been taken by the city council in this matter subsequent to this date.

The defendant rests.

Whereupon, the plaintiff rested and the evidence was closed.

The above and foregoing, together with the stipulation of facts therein referred to, constitutes all the evidence stated in narrative form introduced on behalf of the plaintiff and defendant upon the trial of said cause.

Whereupon, the following occurred, to wit:

47 Mr. MACLANE: The plaintiff having rested, comes now, the defendant by its attorney and renews the motion for non suit on each and every ground stated in the motion made at the close of the plaintiff's case.

The COURT: This motion is denied.

To which ruling of the Court the defendant then and there excepted, which exception was by the court allowed and which ruling the defendant now assigns as error, constituting and being,

Defendant's Exception No. 10.

Thereupon, the following proceedings occurred, to wit;

Mr. MACLANE: The defendant moves that this court instruct the jury to return a verdict for the defendant in this action on the issues raised by the complaint and answer, on the ground that the admitted evidence shows that if there was any contract between the plaintiff company and the defendant city at all, such contract was an implied contract, dependent on impliedly authorized supply of water to the defendant city by the plaintiff company for fire purposes and that said contract, if any there be, did not bind the defendant city to take, accept, or pay for water for any definite period of time, and that immediately at the commencement of the period covered by the complaint in this case, to wit; on the 10th day of May 1906, the undisputed evidence shows that this contract, if there was any such contract, was formally terminated by the mayor and council of Boise City, and that from the 10th day of May 1906, the plaintiff has been under no obligation to supply, nor has the defendant been under any obligation to accept or pay for, any water for fire purposes.

The defendant, as further grounds of this motion, reiterates all the grounds of motion for non-suit made at the close of the plaintiff's case, and repeated by reference at the close of the evidence in this case.

* * * * * * *

48 The COURT: This authorized notification, gentlemen, simply goes to the point of the extra pressure. The city council advises the company that it need not continue the extra pressure. It further advises that it will not pay any further bills for this service. That isn't a notification to the company to cease furnishing water for fire purposes. The schedule of rates is based upon the furnishing of water under certain conditions. The city may have waived one of those conditions. The motion will be denied.

To which ruling of the court the defendant by its counsel then, and there duly excepted, which exception was allowed and which ruling the defendant now assigns as error, constituting and being,

Defendant's Exception No. 11.

The Court then proceeded to instruct the jury and first made a

ement of the facts of the case. This was followed by an instruc-
n as to the effect of the counter claim set up by the defendant, in
language contained in plaintiff's Bill of Exceptions heretofore
d. The Court then proceeded to instruct the jury as to the legal
cts of the filing of the report of the Water Commission. These
tructions were to the effect that the mere filing by the Commission
the report did not of itself constitute an obligation on the part of
city to pay the rate therein prescribed.

Whereupon the Court instructed the jury, in part, as follows:

If you find that the City, through the fire department, and with
e knowledge of the responsible and governing officers of the City,
at is, the city council and the mayor, continued to maintain these
drants for fire purposes, and from time to time as there was need
ntinued to use the water therefrom, and required the company to
nnect its mains with other hydrants—there is some testimony to
the effect that eleven additional hydrants were installed at
the instance of the city, and connected with the Company's
mains,—in other words if you find from all of the evidence
the case that the City, through its responsible officers, the city
uncil and the mayor, continued to maintain these hydrants and
se them as there was need, and take water from the company's
ains, *the water company's mains*, as there was need therefor, if
is was done knowingly, I say then there arises by implication of
w what we call an implied contract on the part of the city to pay
r the water, and in this case an implied obligation to pay in ac-
rdance with the schedule rates. In other words, the Water Com-
any here stood in the position of a merchant or other person hav-
ng goods to sell, with the prices thereof quoted. If you go and
rder an article with price so quoted you do so with the implied
greement and the obligation upon your part to pay for the article
ie price at which it is offered for sale. So here the Water Com-
any stood in the position of having water for sale, for culinary pur-
oses, for use in business buildings, for sprinkling lawns, and for fire
urposes, and if a private person took this water and used it he
ould do so with the implied understanding that he would pay for
at the rate quoted, and, if the City took it, it took it with the im-
lied understanding and imposed obligation to pay for it in accord-
nce with the rates quoted.

To which instruction the defendant by its counsel then and there
xcepted before the jury retired, and assigned the giving of the same
s error and said exception was allowed and the same is now assigned
s error, constituting and being,

Defendant's Exception No. 12.

Thereupon, the Court further instructed the jury as follows:

There was introduced in evidence by the defendant a resolution
f the city council instructing its clerk to notify the Water Company
to discontinue (I read now) "The extra pressure maintained
for fire purposes, as the City would pay no further bills for
this service from this date." That is the substance of the
esolution, at least. I advise you that that resolution in itself even
hough brought to the attention of the Water Company does not or

would not relieve the City from the obligation to pay for water provided it thereafter continued to take the water for fire purposes.

To which instruction the defendant by its counsel then and there excepted before the jury retired and assigned the giving of the same as error, and said exception was allowed, and the same is now assigned as error, constituting and being,

Defendant's Exception No. 13.

The Court in this connection further instructed the Jury:

Now in this connection, or perhaps more properly in connection with the former instruction as to the implied obligation of the city to pay for water, I have to say that in order that the Water Company may recover at all it was not only necessary that it furnish the water for fire purposes, but that it substantially comply with the conditions stated by this water commission in that supplemental report which was read to you. In other words, it was its duty (I read merely to illustrate) to keep what is called the upper reservoir in Hull'c Gulch, situated at an elevation of approximately 169 feet above Main Street constantly filled with water. It was its duty to maintain a steam pressure of at least sixty pounds, etc. In other words all of the requirements and all of the conditions specified in that supplemental report as being obligations of the Water Company had to be substantially fulfilled or complied with. It is in evidence that the steam plant of the company was maintained for a certain length of time after this report was made, and then an electrical plant was
51 installed, and this electric plant was used most of the time in the place of the steam plant.

Thereupon, the Court further instructed the jury as follows:

I advise you that it would not be a violation of the conditions of this supplemental report for the Water Company to substitute an electric plant for a steam plant, provided the one was a substantial equivalent of the other, provided the electric plant would render substantially the same service to the city for the purpose for which it was intended, that is, for fire purposes. It is unimportant to the city it is unimportant to the parties, what the plant was called, if the two plants were substantial equivalents of each other so far as relates to efficiency of service. It would not deprive the Water Company of the right to recover that in some minor unimportant particular it did not comply with these conditions. If the conditions were substantially complied with it would have a right to recover even though there were some technical or unimportant departure from the condition or default to comply with the conditions.

To which instruction the defendant by its counsel then and there duly excepted before the jury retired, and assigned the giving of the same as error, and said exception was allowed and the same is now assigned as error, constituting and being,

Defendant's Exception No. 14.

Whereupon, the defendant further instructed the jury as follows:

The question with you should be whether or not the water company substantially fulfilled these conditions. If so, and if, as I have already instructed you, the City continued to take water for fire

purposes and kept its hydrants connected, and connected new
52 ones from time to time as there was need, accepted the service of the Water Company, then the obligation would be imposed upon the City to pay in accordance with the schedule rates."

To which instruction the defendant by its counsel then and there excepted before the jury retired and assigned the giving of the same as error and said exception was allowed and the same is now assigned as error, constituting and being,

Defendant's Exception No. 15.

The Court then proceeded to instruct the jury to the effect that the burden of proof was upon the plaintiff to show by a preponderance of the evidence that it substantially complied with these conditions and furnished the water, and that the city accepted the water and accepted the service, and maintained its hydrants and took water from time to time, as there was need, from the company's plant.

Before the giving of said instructions the defendant presented to the Court certain written requests to charge the jury, as follows:

1. You are instructed to find the issues raised by the complaint and answer in this case for the defendant.

Which said request the court refused, to which refusal defendant then and there excepted, which exception was, by the Court, allowed, an which rudling the defendant now assigns as error, constituting being,

Defendant's Exception No. 16.

The defendant further, at the same time, presented to the Court a written request to charge the jury, as follows:

3. You are instructed that under the laws of the State of Idaho, and the Charter of Boise City, as the same existed at the time of the report of the commission fixing water rates in said City, which is involved in this suit, the city could only obligate itself to pay
53 water rates by an ordinance or contract authorizing the same, and unless you find from the evidence that the City authorized the plaintiff Company by ordinance, to furnish water for fire purposes, or made a contract for such water, pursuant to an ordinance, motion or resolution of the City Council, the plaintiff cannot recover in this action.

Which said request the Court refused, to which refusal defendant then and there excepted, which exception was by the Court, allowed, and which ruling the defendant now -signs as error, constituting and and being,

Defendant's Exception No. 17.

The defendant further, at the same time, presented to the Court a written request to charge the jury, as follows:

4. You are instructed that the report of the water commission, mentioned in the plaintiff's complaint and embraced in the stipulation of facts filed herein, does not of itself constitute a contract between the City and the Water Company, obligating the City to pay the Water Company the rates for water specified in such report, or any rates, and unless you find from the evidence in addition to such report fixing rates, that there was a contract between the City and the Company obligating the City to accept water and pay such rates,

or an ordinance permitting the water company to furnish water at such rates as had been or might be prescribed by law, the plaintiff is not entitled to recover in this action.

Which said request the Court refused, to which refusal defendant then and there excepted, which exception was, by the Court, allowed, and which ruling the defendant now signs as error, constituting and being,

Defendant's Exception No. 18.

The defendant further, and at the same time, presented to the Court a written request to charge the jury, as follows:

54 5. The burden rests upon the plaintiff in this case to prove by preponderance of the evidence;

1st. That there was a contract or ordinance under which the plaintiff was authorized to furnish the defendant city with water for fire purposes.

2nd. That acting under and pursuant to such ordinance or contract, the plaintiff company did furnish water to the defendant city for such purposes, during the time specified in the complaint.

3rd. That in furnishing such water the plaintiff complied with all the terms and conditions of the report of the water commission, and if any of such terms and conditions were not complied with, the plaintiff cannot recover in this action.

Which said request the Court refused, to which refusal defendant then and there excepted, which exception was, by the Court, allowed, and which ruling the defendant now assigns as error, constituting and being,

Defendant's Exception No. 19.

The defendant further, and at the same time, presented to the Court a written request to charge the jury, as follows:

6. You are instructed that under the pleadings and proof in this case there was no contract between the plaintiff company and the defendant city which obligated said city to accept or pay for water for any stated time from the plaintiff company, and the city had the right to terminate the supply at any time. And if you believe from the evidence that the defendant did, by its council instruct the water company to discontinue supplying water under the terms of the report of the water commission, pleaded and in evidence in this case, such instruction terminated the obligation of the defendant city to accept a further supply of water, or to pay for any water offered to be supplied or supplied without further authority

55 from the city through its council subsequent to the date of such notification of discontinuance.

Which said request the Court refused, to which refusal defendant then and there excepted, which exception was, by the Court, allowed, and which ruling the defendant now assigns as error, constituting and being,

Defendant's Exception No. 20.

The defendant further, and at the same time, presented to the Court a written request to charge the jury, as follows:

7. You are instructed that under the Charter of Boise City the power to contract for water supply for fire and other municipal pur-

poses was vested solely in the Mayor and City Council, and that neither the fire chief, nor any member or members of the fire department, had any power or authority to bind the City to pay for water for fire purposes by connecting the fire apparatus with hydrants attached to the plaintiff's mains, unless such acts on their part were done in pursuance to authorization of the Mayor and Council.

Which said request the Court refused, to which refusal defendant then and there excepted, which exception was, by the Court, allowed, and which ruling the defendant now assigns as error, constituting and being,

Defendant's Exception No. 21.

The defendant further, and at the same time, presented to the Court a written request to charge the jury, as follows:

8. You are instructed that by the express terms of the report of the water commission, on which the plaintiff relies to recover in this case, it was provided that the rate was "For the best service that can be obtained from the present water system, and in case that service is not rendered and the standard here fixed maintained, no payment shall be made." Under such report the plaintiff com-
56 pany was bound to observe every condition therein required of it, and it cannot recover in this action for any period of time during which any such condition was not complied with by it.

Among other conditions of such report the plaintiff company was required to maintain a steam pressure of at least 60 pounds in the boilers and pumps at the pumping station and to keep fires continuously under the boilers. Under this provision the company could not install a substituted system gauged by some different standard of efficiency and recover under the terms of this report for a time during which such substituted system was in operation.

You are further instructed that in order to entitle it to recover under the terms of this report the company was required to pay for and maintain the fire alarm system outside of the City limits, and that if they have not done so they cannot recover in this action. Said company was also required to keep 550,000 gallons of water continuously in storage for use in case of fire and unless they did so they are not entitled to recover in this action.

Which said request the Court refused, to which refusal defendant then and there excepted, which exception was, by the Court, allowed, and which ruling the defendant now assigns as error, constituting and being,

Defendant's Exception No. 22.

And whereas, the foregoing matters and things do not appear of record in said cause, but are proper to be made of record, comes now the said defendant, by its counsel, P. E. Cavaney, Esquire, and Cavanah, Blake & MacLane, and propose the above and foregoing bill of exceptions, and prays that the same may be settled and allowed as such.

Dated Boise, Idaho, March 19th, 1912.

P. E. CAVANEY, *City Att'y, &*
CAVANAH, BLAKE & MACLANE,
Att'ys for the Defendant.

57 It is hereby stipulated by and between counsel that th above and foregoing is a true and correct bill of exceptio of the matters therein contained; that it contains all the eviden introduced on the trial of said cause stated in narrative form; all the instructions, proceedings and other matters pertaining to the e ceptions therein contained, and that it may be settled and allowe and certified as such.

Dated Boise, Idaho, March 19th, 1912.

JOHNSON & JOHNSON,
Attorneys for the Plaintiff.
P. E. CAVANEY AND
CAVANAH, BLAKE & MACLANE,
Attorneys for the Defendant.

The above and foregoing proposed bill of exceptions being du presented within the time allowed by stipulation of counsel and ord of the Court made upon the trial in that behalf, is hereby allowe and settled as and for the defendant's bill of exceptions; that th same contains all the evidence introduced upon the trial stated i narrative form, and all of the instructions, pleadings and other ma ters pertaining to the exceptions contained in said bill.

Dated Boise, Idaho, April 9th, 1912.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed April 9th, 1912. A. L. Richardson, Clerk.

58 *Petition for Writ of Error.*

In the District Court of the United States for the District of Idah Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporatio Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Comes now, the defendant Boise City and says: That on or abo the 22nd day of February, 1912, the said District Court entered judgment herein in favor of the plaintiff and against this defenda in which judgment and the proceedings had prior thereto in th cause certain errors were committed to the prejudice of this defen ant, all of which will more in detail appear in the assignment errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue its behalf out of the Supreme Court of the United States for the c rection of the error so complained of, and that a transcript of t

record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

P. E. CAVANEY,
City Attorney, and
CAVANAH, BLAKE & MACLANE,
Attorneys for the Defendant.

Dated April 13, 1912.

Endorsed: Filed April 13, 1912. A. L. Richardson, Clerk.

59 *Assignment of Errors.*

In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Comes now, the above named defendant, Boise City, and in connection with its petition for writ of error, makes the following assignment of errors, which it avers exist in the judgment and proceedings leading to the judgment herein;

I.

The Court erred in sustaining defendant's motion to strike certain paragraphs from the defendant's answer as reserved and shown in the defendant's bill of exceptions upon said ruling.

II.

The Court erred in refusing to permit the defendant to file a supplemental answer as shown in the defendant's bill of exceptions to said ruling.

III.

The Court erred in overruling defendant's objection to the introduction of any evidence under the complaint based upon the ground that the complaint failed to state a cause of action, all of which is shown in defendant's exception No. 1, to the rulings upon the trial.

60 IV.

The Court erred in permitting the following question over the objection therein noted to which answer was made as herein stated.

(By Mr. JOHNSON, counsel for plaintiff:)

Q. After the report of the commission went into effect Mr. Howe, state whether or not the upper reservoir in Hull's Gulch which you

have referred to, at an elevation of approximately 169 feet above Main Street, was kept constantly filled with water?

Mr. MACLANE: If the Court please, we object to that on the ground that it states a conclusion of the witness, and on the further ground that it does not appear that the witness knows of his own knowledge whether it was kept full of water or not, and on the further ground that it is leading and suggestive.

The COURT: The question is leading, otherwise I think it is unobjectionable. I think I will overrule the objection.

To which ruling of the Court the defendant then and there excepted and which exception was by the Court allowed and which ruling the defendant now assigns as error, constituting and being, defendant's exception No. 2.

(By witness, Mr. HOWE:)

A. Yes sir, it was kept full all the time.

V.

The Court erred in permitting the following question over the objection of the defendant, therein noted, to which answer was made as herein stated.

Mr. JOHNSON: Was it kept full all the time between the 1st of June, 1906, and the 30th day of August 1909?

To which question the defendant made the same objection as hereinbefore noted in Exception No. 2, and the Court made the same ruling, which said ruling was by the defendant duly excepted to and which said exception was by the Court allowed, and which
61 ruling the defendant now assigns as error, constituting and being, defendant's exception No. 3.

(The WITNESS:)

A. Yes sir.

VI.

The Court erred in permitting the following question over the objection of the defendant, therein noted, to which answer was made as herein stated:

(By Mr. JOHNSON:)

Q. How does that compare in efficiency with the capacity of the steam pump you had used prior to that time?

Mr. MACLANE: If the Court please, we object to that question on the ground that it is irrelevant and immaterial and for the further reason that the test of efficiency is prescribed by the report of the commission, and the company had no right to substitute any other efficiency test.

Which objection was by the Court overruled, to which ruling of the Court the defendant then and there duly excepted, which exception was by the Court allowed, which ruling the defendant now assigns as error, the same constituting and being, Defendant's Exception No. 4.

(The WITNESS:)

A. It was about equal to the steam pressure. I think a little more.

VII.

The Court erred in permitting the following question over the objection of the defendant, therein noted, to which answer was made as herein stated:

Q. Do you know how many gallons per hour as against a 200 foot head the electric pump would supply?

To which question defendant objected for the same reasons as in the preceding exception, which objection was by the Court overruled, to which ruling of the Court the defendant then and there
62 duly excepted, which exception was by the Court allowed and which ruling the defendant now assigns as error, constituting and being, defendant's Exception No. 5.

(The WITNESS:)

A. I think about 110,000 gallons an hour, being 1850 gallons a minute multiplied by 60.

VIII.

The Court erred in permitting the following question over the objection of the defendant, therein noted, to which answer was made as herein stated.

Q. How much would the steam pump pump an hour or in a minute?

To which question and following questions of the same import the defendant objected on the same ground as in exception No. 4, which objection was overruled, to which ruling defendant duly excepted and which exception was by the Court allowed and which ruling the defendant now assigns as error, constituting and being, Defendant's Exception No. 6.

A. The steam pumps would pump 189 to the stroke and if run fast would pump more; against the fire pressure it would run 40 to 45 strokes a minute which would bring each pump to an efficiency of 720 gallons, making 1440 gallons per minute for both pumps or a little over 86,000 gallons an hour as compared with 12,000 in the electrical pumps. The pressure, however, would be the same as the head of water pumped against the same reservoir, being limited by the opening at the upper end into the reservoir as the entire system led into that reservoir; all surplus water not being distributed into the town flows into the reservoir.

IX.

The Court erred in permitting the following question over the objection of the defendant, therein noted, to which answer was made as herein stated:

63 (Mr. JOHNSON:)

Q. Did you at any time make demand for amounts due, and if so state just what you did?

The COURT: Why go into that? The demand is admitted is it not?

Mr. JOHNSON: I wanted to show, if your Honor please, that it was presented to the auditor and sworn to, and that we went through this due course.

Mr. MACLANE: I think to preserve the record we will object on the ground that it is not pleaded. Also, if the Court please, it is not the best evidence. The statement itself should be produced.

The COURT: I assume this is preliminary. You may answer the question.

To which ruling the defendant then and there duly excepted, which exception was by the Court allowed and which ruling the defendant now assigns as error, constituting and being defendant's exception No. 7.

A. We took our bills to the City Clerk and swore to them; she is secretary of the auditing committee and we swore to every one. The clerk makes out the list and takes them into the auditing board and that was the course we pursued with reference to those bills and demands for their payment.

X.

The Court erred in permitting the following question over the objection of the defendant, therein noted, to which answer was made as herein stated;

Q. How did that compare with the capacity of the steam plant?

To which question the defendant by its counsel objected on the ground that the same was irrelevant and immaterial and for
64 the further reason that the test of efficiency is prescribed by the report of the commission and the company had no right to prescribe any other efficiency test, which objection was by the court overruled to which ruling the defendant then and there duly excepted, which exception was by the court allowed and which ruling the defendant now assigns as error constituting and being defendant's exception No. 8.

A. The steam plant was about 91,000 gallons an hour. It did not take as long to bring the electric pump into operation after an alarm as it did the steam pump. It only took about a half a minute.

XI.

The Court erred in denying defendant's motion for nonsuit made when the plaintiff rested on each and every ground stated in said motion all of which is shown in defendant's exception No. 9, taken to the rulings upon the trial.

XII.

The Court erred in denying the defendant's motion for non-suit, renewed at the close of the evidence, on each and every ground

therein stated, all of which is shown by defendant's exception No. 10, taken to the rulings upon the trial.

XIII.

The Court erred in denying the defendant's motion for directed verdict in favor of the defendant and against the plaintiff at the close of all the evidence, all of which is shown in defendant's Exception No. 11, taken to the rulings upon the trial.

XIV.

The Court erred in instructing the jury over the defendant's objection as shown in defendant's exception No. 12, taken to the rulings upon the trial, as follows:

If you find that the City, through the fire department, and with the knowledge of the responsible and governing officers of the City, that is, the city council and the mayor, continued to maintain these hydrants for fire purposes, and from time to time as there was need continued to use the water therefrom and required the company to connect its mains with other hydrants—there is some testimony to the effect that eleven additional hydrants were installed at the instance of the City, and connected with the Company's mains—in other words, if you find from all of the evidence in the case that the City, through its responsible officers, the city council and the mayor, continued to maintain these hydrants and use them as there was need, and take water from the company's mains, the Water Company's mains, as there was need therefor, if this was done knowingly, I say, then there arises by implication of law what we call an implied contract on the part of the City to pay for the water, and in this case an implied obligation to pay in accordance with the schedule rates. In other words, the Water Company here stood in the position of a merchant or other person having goods to sell, with the prices thereof quoted. If you go and order an article with price so quoted you do so with the implied agreement and the obligation upon your part to pay for the article the price at which it is offered for sale. So here the Water Company stood in the position of having water for sale, for culinary purposes, for use in business buildings, for sprinkling lawns, and for fire purposes, and if a private person took this water and used it he would do so with the implied understanding that he would pay for it at the rate quoted, and, if the City took it, it took it with the implied understanding and imposed obligation to pay for it in accordance with the rates quoted.

To which instruction the defendant by its counsel then and there excepted before the jury retired, and assigned the giving of the same as error and said exception was allowed and the same is now assigned as error, constituting and being, defendant's exception No. 12.

XV.

The Court erred in instructing the jury over the defendant's objection as shown in defendant's exception No. 13 taken to the rulings upon the trial, as follows:

There was introduced in evidence by the defendant a resolution of the city council instructing its clerk to notify the Water Company to discontinue (I read now) "the extra pressure maintained for fire purposes, as the City would pay no further bills for this service from this date." That is the substance of the resolution, at least. I advise you that that resolution in itself, even though brought to the attention of the Water Company, does not or would not relieve the City from the obligation to pay for water provided it thereafter continued to take the water for fire purposes.

To which instruction the defendant, by its counsel, then and there excepted before the jury retired, and assigned the giving of the same as error, and said exception was allowed, and the same is now assigned as error, constituting and being, defendant's exception No. 13.

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XVI.

The Court erred in instructing the jury over the defendant's objection as shown in defendant's exception No. 14, taken to the rulings upon the trial, as follows:

I advise you that it would not be a violation of the conditions of this supplemental report for the Water Company to substitute an electric plant for a steam plant, provided, the one was a substantial equivalent of the other, provided the electric plant would render substantially the same service to the city for the purpose for which it was intended, that is, for fire purposes, that the steam plant would. It is unimportant to the city, it is unimportant to the parties, what the plant was called, if the two plants were substantial equivalents of each other so far as relates to efficiency of service. It would not deprive the Water Company of the right to recover that in some minor unimportant particular it did not comply with these conditions. If the conditions were substantially complied with it would have a right to recover, even though there were some technical or unimportant departure from the conditions, or default to comply with conditions.

To which instruction the defendant, by its counsel, then and there duly excepted before the jury retired, and assigned the giving of the same as error, and said exception was allowed and the same is now assigned as error, constituting and being, defendant's exception No. 14.

XVII.

The Court erred in instructing the jury over the defendant's objection as shown in defendant's exception No. 15, taken to the rulings on the trial, as follows:

The question with you should be whether or not the water company substantially fulfilled these conditions. If so, and if, as I have already instructed you, the city continued to take water for fire purposes and kept its hydrants connected, and connected new ones from time to time as there was need, accepted the service of the Water Company then the obligation would be imposed upon the City to pay in accordance with the schedule rates.

67 To which instruction the defendant, by its counsel, then and there excepted before the jury retired, and assigned the giving of the same as error and said exception was allowed and the same is now assigned as error, constituting and being, defendant's exception No. 15.

XVIII.

The Court erred in refusing to give the defendant's first request to charge as shown in defendant's exception No. 16 to rulings upon the trial; said request being as follows:

You are instructed to find the issues raised by the complaint and answer in this case for the defendant.

XIX.

The Court erred in refusing to give the defendant's third request to charge as shown by the defendant's exception No. 17, to the rulings upon the trial, said request being as follows:

You are instructed that under the laws of the State of Idaho and the Charter of Boise City, as the same existed at the time of the report of the commission fixing water rates in said City, which is involved in this suit, the city could not obligate itself to pay water rates by an ordinance or contract authorizing the same, and unless you find from the evidence that the City authorized the plaintiff Company by ordinance, to furnish water for fire purposes, or made a contract for such water, pursuant to an ordinance, motion or resolution of the city council, the plaintiff cannot recover in this action.

XX.

The Court erred in refusing to give the defendant's fourth request to charge as shown by the defendant's exception No. 18 to the rulings upon the trial, said request being as follows:

You are instructed that the report of the water commission mentioned in the plaintiff's complaint and embraced in the stipulation of facts filed herein, does not of itself constitute a contract
68 between the City and the Water Company, obligating the city to pay the water company the rates for water specified in such report, or any rates, and unless you find from the evidence in addition to such report fixing rates, that there was a contract between the City and the Company obligating the City to accept water and pay such rates, or an ordinance permitting the water company to furnish water at such rates as had been or might be prescribed by law, the plaintiff is not entitled to recover in this action.

XXI.

The Court erred in refusing to give the defendant's fifth request to charge as shown by the defendant's exception No. 19 to the rulings upon the trial, said request being as follows:

The burden rests upon the plaintiff in this case to prove by preponderance of the evidence:

1. That there was a contract or ordinance under which the plain-

tiff was authorized to furnish to defendant city water for fire purposes.

2. That acting under and pursuant to such ordinance or contract the plaintiff company did furnish water to the defendant city for such purposes, during the time specified in the complaint.

3. That in furnishing such water the plaintiff complied with all the terms and conditions of the report of the water commission, and if any of such terms and conditions were not complied with, the plaintiff cannot recover in this action.

XXII.

The Court erred in refusing to give the defendant's sixth request to charge as shown by the defendant's exception No. 20 to the rulings upon the trial, said request being as follows:

You are instructed that under the pleadings and proof in
69 this case that there was no contract between the plaintiff company and the defendant city which obligated said city to accept or pay for water for any stated time from the plaintiff company, and the city had the right to terminate the supply at any time. And if you believe from the evidence that the defendant did, by its council instruct the water company to discontinue supplying water under the terms of the report of the water commission, pleaded and in evidence in this case, such instruction terminated the obligation of the defendant city to accept a further supply of water or to pay for any water offered to be supplied or supplied without further authority from the city through its council subsequent to the date of such notification of discontinuance.

XXIII.

The Court erred in refusing to give the defendant's seventh request to charge as shown by the defendant's exception No. 21 to the rulings upon the trial, said request being as follows:

You are instructed that under the Charter of Boise City the power to contract for water supply for fire and other municipal purposes was vested solely in the Mayor and City Council, and that neither the fire chief, nor any member or members of the fire department had any power or authority to bind the city to pay for water for fire purposes by connecting the fire apparatus with hydrants attached to the plaintiff's mains, unless such acts on their part were done in pursuance to authorization of the Mayor and Council.

XXIV.

The Court erred in refusing to give the defendant's eighth request to charge as shown by defendant's exception No. 22, to the rulings upon the trial, said request being as follows:

You are instructed that by the express terms of the report of the water commission, on which the plaintiff relies to recover in
70 this case, it was provided that the rate was "For the best service that can be obtained from the present wate system

and in case that service is not rendered and the standard here fixed maintained, no payment shall be made." Under such report the plaintiff company was bound to observe every condition therein required of it, and it cannot recover in this action for any period of time during which any such condition was not complied with by it.

Among other conditions of such report the plaintiff company was required to maintain a steam pressure of at least 60 pounds in the boilers and pumps at the pumping station and to keep fires continuously under the boilers. Under this provision the company could not install a substituted system gauged by some different standard of efficiency and recover under the terms of this report for a time during which such substituted system was in operation.

You are further instructed that in order to entitle it to recover under the terms of this report the company was required to pay for and maintain the fire alarm system outside of the City limits, and that if they have not done so they cannot recover in this action. Said company was also required to keep 550,000 gallons of water continuously in storage for use in case of fire and unless they did so they are not entitled to recover in this action.

XXV.

The Court erred in entering judgment in favor of the plaintiff and against the defendant.

Wherefore, defendant prays that upon the foregoing assignment of errors the said judgment in favor of the plaintiff and against the defendant be reversed and said District Court be ordered to enter judgment upon said record in favor of the defendant and against the plaintiff.

71 Dated Boise, Idaho, April 13, 1912.

P. E. CAVANEY, *City Attorney, and*
CAVANAH, BLAKE & McLANE,
Att'ys for the Defendant, Boise City, Boise, Idaho.

Endorsed: Filed April 13, 1912. A. L. Richardson, Clerk.

72 *Order Allowing Writ of Error.*

In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

On this 13th day of April, 1912, comes the defendant by its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error and assignment of errors intended to be urged by it, and praying also that a transcript of the rec-

ord and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the Court does hereby allow said writ of error in accordance with the prayer of said petition. Bond fixed at $500.00.

FRANK S. DIETRICH,
District Judge.

Dated Boise, Idaho, April 13, 1912.

Endorsed: Filed April 13, 1912. A. L. Richardson, Clerk.

73 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Judges of the District Court of the United States for the District of Idaho, Southern Division, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said district court before you, between The Boise Artesian Hot & Cold Water Company, Limited, plaintiff, and Boise City, defendant, a manifest error has happened, to the great damage of the said Boise City, as by its complaint appears; we, being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do comamnd you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ so that you may have the same at the city of Washington within sixty days from the day of signing the citation, in the said Supreme Court, to be then and there held, that, on the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 13 day of April, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States of America the one hundred and thirty sixth.

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON,
Clerk of the District Court of the United States for the District of Idaho, Southern Division.

Allowed by:
FRANK S. DIETRICH,
District Judge.

74 [Endorsed:] No. 313. In the District Court of the United States for the District of Idaho, Southern Division. The Boise A. H. & C. Water Co., Plaintiff, v. Boise City, Defendant. Writ of Error. Filed on return April 13, 1912. A. L. Richardson, Clerk.

75 THE UNITED STATES OF AMERICA,
District of Idaho, ss:

To The Boise Artesian Hot & Cold Water Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Idaho, Southern Division, wherein Boise City is plaintiff in error and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Boise, in the District above named, this 13 day of April, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States District Court, Idaho. 1890.]

FRANK S. DIETRICH,
Judge of the District Court of the United States for the District of Idaho, Southern Division.

Attest:

A. L. RICHARDSON,
Clerk of said Court.

Due and personal service of the above Citation admitted on behalf of the plaintiff, Boise Artesian Hot & Cold Water Co., this 13 day of April, 1912.

RICHARD H. JOHNSON,
Att'y for the Plaintiff.

76 [Endorsed:] No. 313. In the District Court of the United States, District of Idaho, Southern Division. The Boise A. H. & C. Water Co., Plaintiff, v. Boise City, Defendant. Citation. Filed on return April 13th, 1912. A. L. Richardson, Clerk.

77 *Bond on Writ of Error.*

Know all men by these presents, That the undersigned, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation authorized to transact surety business and to give and execute judicial bonds in the State of Idaho, is held and firmly bound unto The Boise Artesian Hot & Cold Water Company in the full and just sum of $500.00, to be paid to the said The Boise Artesian Hot & Cold Water Company, its attorneys, successors or assigns; to which payment well and truly to be made the undersigned binds itself, its successors and assigns, jointly and severally by these presents.

Sealed with its seal, and dated this 13th day of April in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately in a district court of the United States, in a suit depending in said court by The Boise Artesian Hot & Cold Water Company, plaintiff, and Boise City, defendant, a judgment was rendered against the said Boise City, and the said Boise City having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment of the said court, and a citation directed to the said The Boise Artesian Hot & Cold Water Company citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington within sixth days from the date of said citation.

Now, the condition of the above obligation is such that if the said Boise City shall prosecute said writ of error to effect and answer all costs, if it fail to make its said plea good, then the above obligation to be void, else to remain in full force and virtue.

78 Sealed and delivered the day and year above written.

THE UNITED STATES FIDELITY AND GUARANTY CO. OF BALTIMORE, MARYLAND,

[SEAL.]

By W. D. McREYNOLDS, *Attorney in Fact.*

By J. T. PENCE, *Attorney in Fact.*

Approved.

DIETRICH, *Judge.*

April 13, 1912.

Endorsed: Filed April 13, 1912. A. L. Richardson, Clerk.

79 *Return to Writ of Error.*

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Supreme Court, and the same is transmitted accordingly.

Attest:

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON, *Clerk.*

80 *Stipulation as to What Shall Constitute Record.*

In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

It is hereby stipulated by and between the above named parties, through their counsel, in accordance with paragraph 1 of Rule 8 of

the Rules of the Supreme Court, that the transcript of record on writ of error in the above entitled cause, heretofore allowed upon application of defendant, shall consist of the following portions of the record only:

I.

Defendant, Boise City's, bill of exceptions on motion to strike certain parts of defendant's answer.

II.

Defendant, Boise City's, bill of exceptions to the order of the Court on motion for leave to file supplemental answer and counterclaim.

III.

Defendant, Boise City's, bill of exceptions to the rulings upon the trial.

IV.

Defendant, Boise City's petition for writ of error.

81 V.

Defendant's, Boise City's, assignment of errors.

VI.

Order allowing defendant, Boise City's, writ of error.

VII.

Defendant, Boise City's, writ of error.

VIII.

Citation on said writ, and bond on said writ.

IX.

Return to said writ.

X.

This stipulation as to what shall constitute the record.

XI.

Certificate of the clerk to record.

It is further stipulated and agreed that the complaint, answer, amendment to answer by way of counterclaim, stipulation of facts (shown in plaintiff's bill of exceptions), verdict of the jury, and the judgment, all of which appear in the record, heretofore certified in this cause upon the plaintiff's The Boise Artesian Hot & Cold Water Company's application and writ of error are to be deemed and may be referred to as part of the record upon this writ of error.

That the record upon said writ of error of said plaintiff, The Boise Artesian Hot & Cold Water Company, and upon this writ of error of this defendant, Boise City, shall be printed and bound together and that the Clerk of the Supreme Court in the first instance shall apportion the costs of such printing and binding between the parties hereto in proportion to the respective portions of the record certified on their respective applications. That this writ of error
82 shall, if conformable to the rules and practice of the Supreme Court, be docketed, together with the writ of error heretofore sued out on application of The Boise Artesian Hot & Cold Water Company, and both said writs of error may be presented, argued and submitted as a single cause, each party reserving, however, any and all rights to contest the jurisdiction of the Court upon either writ of error or the regularity of the writ.

Dated Boise, Idaho April 13, 1912.

RICHARD H. JOHNSON,
Attorney for the Plaintiff.
P. E. CAVANEY,
CAVANAH, BLAKE & MACLANE,
Attorneys for the Defendant.

Endorsed: Filed April 13, 1912. A. L. Richardson, Clerk.

83 *Clerk's Certificate.*

In the District Court of the United States for the District of Idaho, Southern Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

I, A. L. Richardson, Clerk of the District Court of the United States, in and for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 84, inclusive, contain true and correct copies of the Defendant, Boise City's bill of exceptions on motion to strike certain parts of defendant's answer; Defendant, Boise City's, bill of exceptions to the order of the Court on motion for leave to file supplemental answer and counterclaim; Defendant, Boise City's, bill of exceptions to the rulings upon the trial; Defendant, Boise City's, petition for writ of error; Defendant, Boise City's, assignment of errors; Order allowing defendant, Boise City's, writ of error; Defendant, Boise City's, writ of error; Citation on said writ, and bond on said writ; Return to said writ; This stipulation as to what shall constitute the record, and Certificate of the clerk to record, in the above entitled cause, which together constitute the transcript of the record and return to the annexed writ of error.

I further certify that the cost of the record herein amounts to the sum of $57.70, and that the same has been paid by the plaintiff in error.

84 Witness my hand and the seal of said District Court affixed at Boise, Idaho, this 17th day of April, 1912.

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON, *Clerk.*

Endorsed on cover: File No. 23,085. Idaho D. C. U. S. Term No. 573. The Boise Artesian Hot & Cold Water Company, Limited, plaintiff in error, vs. Boise City. Filed March 13, 1912. File No. 23,194. Term No. 639. Boise City, plaintiff in error, vs. The Boise Artesian Hot & Cold Water Company, Limited. Filed April 29th, 1912. File Nos. 23,085 and 23,194.